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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

ABRAHAM FRANCIS, Petitioner

VERSUS

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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74-5808

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ABRAHAM FRANCIS,

Petitioner

VERSUS

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Abraham Francis, through counsel, moves the Court for leave to proceed in forma pauperis on his Petition for Writ of Certiorari, showing to the Court that he was represented in the United States District Court on his petition for writ of habeas corpus and in the Fifth Circuit on appeal, by undersigned counsel appointed under the provisions of the Criminal Justice Act, 18 U.S.C. §3006A et seq.

This motion is filed under Rule 53(1) of this Court, and pursuant to 18 U.S.C. §3006A(d)(6).

Respectfully submitted,

LOLIS E. ELIE
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C. MURRAY HENDERSON, Warden
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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner, Abraham Francis, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. That judgment reversed a district court decision, that had set aside petitioner's state conviction and sentence for felony murder.

OPINIONS BELOW

The opinion of the court of appeals is reported at 496 F. 2d 896 and appears at Appendix A, infra, pp. 7 - 13. The opinion of the district court is unreported and appears at Appendix B, infra, pp. 14 - 22.

JURISDICTION

The jurisdiction of this court to review by writ of certiorari the

judgment of the court of appeals is invoked under 28 U.S.C. §1254(1). The original opinion and judgment of the court of appeals were rendered on June 28, 1974. A timely application for rehearing and rehearing en banc was denied on October 7, 1974. 502 F.2d 1167. (Appendix C). This petition for certiorari is filed within 90 days of that date. 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. A state prisoner failed to raise, within the time limits set by a state procedural rule, an objection to the composition of the grand jury that indicted him. The question for decision is whether this failure is a bar to his raising the issue in a federal forum on habeas corpus.

2. If the failure to raise the issue timely is a bar, must the state prisoner's showing, in order to justify relief from the implied waiver, be one of "cause" or must he show "actual prejudice?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1 :

". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

Louisiana Revised Statutes, Title 15, Section 202 (repealed) :

"All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against an array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

STATEMENT OF THE CASE

Abraham Francis, a black man, was indicted for felony murder by the Orleans Parish Grand Jury on December 10, 1964. Francis was sixteen and indigent at the time. He was without counsel until February 9, 1965, when the state judge appointed for his defense an attorney who had not handled a criminal case for a number of years. Francis stood trial June 24, 1965; he was found guilty and given a life sentence Appointed counsel filed no motions in Francis' behalf until the day before the trial and did not perfect an appeal. No attack on the grand jury or general

venire was made.

On June 10, 1971, Francis filed pro se a petition for habeas corpus in state court alleging racial discrimination in the selection of the grand jury that had indicted him. A hearing was held and the state judge found that Francis' right to attack the grand jury had prescribed under Louisiana law; he did not reach the merits. The Louisiana Supreme Court denied the application for writs.

Francis filed federal habeas corpus March 3, 1972. On September 20, 1973, the district court ordered Francis' conviction and sentence set aside on the ground that the indicting grand jury was constitutionally defective. The state raised the argument that Davis v. United States, 411 U.S. 233 (1973), precluded Francis from attacking the grand jury. That argument was rejected and Davis distinguished. The court then went on to say that even if Davis controlled, it would still grant relief because Francis had shown "cause" sufficient to bring the case within the kind of exception envisioned by Federal Rule 12 (b)(2).

The state appealed to the Fifth Circuit, arguing that Davis required the federal courts to regard Louisiana's state procedural rule, LSA-R.S. 15:202 (repealed), as a bar to federal habeas relief. The court of appeals agreed; it held that the State's forfeiture rule must be strictly regarded. Since the Louisiana statute was absolute in its terms, however, and thus unlike Federal Rule 12 (b)(2), the court engrafted an exception onto the state law : if a federal petitioner could show "actual prejudice," he should be excused non-compliance with the state rule. The court flatly rejected the argument that where the petitioner was a state prisoner, the question of waiver was controlled by Fay v. Noia, 372 U.S. 391 (1963). Francis now seeks certiorari from the judgment of the Fifth Circuit.

REASONS FOR GRANTING WRIT

Abraham Francis' case presents, squarely and unavoidably, the question of whether the effectiveness of a purported waiver by a state prisoner is to be judged by the standards of Fay v. Noia, 372 U.S. 391 (1963) or by those of Davis v. United States, 411 U.S 233 (1973). This court is quite familiar with both cases, of course, and no purpose is served by rehashing their history. It should be noted,

however, that the Court in Davis said nothing about overruling Fay v. Noia. What it did was to reject the argument that Fay v. Noia controlled a situation where the petitioner was a federal prisoner. And for a sound reason : the federal prisoner, unlike a state prisoner, has already had a federal forum in which to assert federal constitutional rights.

Until this Court decided the Davis case, the Fifth Circuit had consistently decided waiver issues by following the standard of Fay v. Noia : a waiver under state law will not be given force absent a showing by the state of deliberate bypass or knowing waiver. Labat v. Bennett, 365 F 2d 698 (5th Cir. 1966) (en banc), cert. den., 386 U.S. 991 (1967), was the controlling precedent.

What the Fifth Circuit has apparently done is to conclude that Davis was meant to overrule Fay v. Noia and, by implication, Labat. In several terse per curiam opinions, Rivera v Wainwright, 488 F. 2d 275 (5th Cir. 1974); Marlin v. Florida, 489 F. 2d 702 (5th Cir. 1974); Jones v. Henderson, 494 F. 2d 47 (5th Cir. 1974), the Fifth Circuit has refused to follow Labat. It has instead chosen to test state waivers by the standard of Rule 12(b)(2). Now, in the instant case, it has gone even beyond Davis and has placed before Francis a barrier of showing not merely "cause" why he should be excused from strict compliance but that he was "actually prejudiced" by the admittedly unconstitutional grand jury. Francis, a state prisoner, is to be held to a standard more rigorous than that he would confront if he were a federal prisoner and had been in a federal forum all along.

There is another reason why this Court should hear Francis' case : the Fifth Circuit is in conflict with the Fourth Circuit. In Guzewicz v. Slayton, 366 F. Supp. 1402 (E D. Va. 1973) and Hairston v Cox, 361 F. Supp. 1180 (W.D. Va. 1973), two district courts have held that Fay v. Noia and McNeil v. North Carolina, 368 F. 2d 313 (4th Cir. 1966) are still the controlling precedents. Both courts rejected the argument that Davis had changed the ground rules for state prisoners. Hairston was affirmed by a three judge panel and then affirmed en banc. The en banc court, however, did not reach the merits. Still, the conflict is clear between the

circuits. Sound judicial administration, as well as simple justice, require that this Court, not Fourth and Fifth Circuit panels, decide whether Davis or Fay v. Noia standards are to govern questions of this type in the future.

CONCLUSION

A writ of certiorari should be granted to resolve uncertainty and to establish controlling principles.

Lolis E. Elie

LOLIS E. ELIE
Attorney for Petitioner

APPENDIX

Appendix A

John NEWMAN, Petitioner-Appellee,

v.

C. Murray HENDERSON, Warden, Louisiana State Penitentiary, Respondent-Appellant.

Abraham FRANCIS, Petitioner-Appellee,

v.

C. Murray HENDERSON, Warden, Louisiana State Penitentiary, Respondent-Appellant.

Nos. 73-3393, 73-3670.

United States Court of Appeals,
Fifth Circuit.

June 28, 1974.

Appeals were taken from the grants of Louisiana prisoners' petitions for writ of habeas corpus by the United States District Court for the Eastern District of Louisiana, at New Orleans, Frederick J. R. Heebe, Chief Judge, and James A. Comiskey, J. The appeals were consolidated. The Court of Appeals, Dyer, Circuit Judge, held that with respect to petitioner who had not shown prejudice Louisiana rule providing for waiver of challenges to jury not timely raised precluded considering his federal habeas corpus petition based on challenge to grand jury, but with respect to the other prisoner who had not had opportunity to show prejudice, his case would be remanded for opportunity to make such showing with respect to his grand jury challenge.

Grant of petition as to one prisoner vacated and case remanded with directions to dismiss petition and grant of petition to other prisoner vacated and case remanded for further proceedings.

Synopsis, Syllabi and Key Number Classification
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1. Habeas Corpus ⇐45.3(1)

Where Louisiana prisoner's claim of discrimination in composition of grand jury which returned indictment against him was rejected by Louisiana court, in proceeding after conviction, on ground that grand jury system prevailing at time of indictment had not been discriminatory, Louisiana rule providing that challenges to jury are deemed waived if not timely raised prior to trial precluded relief on his petition for federal habeas corpus based on claim of discrimination in composition of grand jury. LSA–C.Cr.P. art. 535; 28 U.S. C.A. § 2254.

2. Habeas Corpus ⇐45.3(1)

Louisiana rule, made absolute in form, providing that the challenges to selection of jury are deemed waived if not raised timely prior to trial must have an exception engrafted thereon to allow federal habeas corpus court to excuse noncompliance with statute procedural requirements when petitioner can demonstrate actual prejudice. LSA–C.Cr.P. art. 535; 28 U.S. C.A. § 2254.

3. Habeas Corpus ⇐113(13)

Where Louisiana prisoner, who unsuccessfully sought habeas corpus relief in Louisiana court which rejected prisoner's challenge to validity of grand jury selection procedures since he had failed to file objection within period specified by applicable Louisiana rule, had not had a chance to show prejudice, his petition for federal habeas corpus based on claim of improper selection procedure for grand jury which indicted him must be remanded and petitioner given an opportunity to make showing of prejudice which would preclude application of waiver rule. LSA–C.Cr.P. art. 535; 28 U.S.C.A. § 2254.

Appeals from the United States District Court for the Eastern District of Louisiana.

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Before DYER and MORGAN, Circuit Judges, and KRAFT, District Judge.

DYER, Circuit Judge:

These consolidated appeals raise the question of whether a state prisoner may challenge the validity of his indictment in a federal habeas corpus proceeding when a state rule of procedure prohibits the issue from being untimely raised in state court. We adhere to the principle that a district court cannot disregard the operation of a state waiver rule, absent a showing of actual prejudice by the habeas petitioner. Because the relief granted by the district courts did not comport with this waiver-by-failure-to-object principle, the district courts' writs must be vacated.

Newman was indicted by an Orleans Parish, Louisiana, grand jury in October, 1962 for aggravated rape and was convicted after a jury trial for that offense. Francis was indicted for felony murder by a grand jury in the same parish in December of 1964 and was subsequently found guilty by a jury of the offense charged. Thereafter both Newman and Francis unsuccessfully sought habeas relief in the Louisiana courts, alleging, *inter alia*, racial discrimination in the selection of their grand juries. Newman's petition was rejected on the ground that the grand jury system prevailing at the time of his indictment had not been discriminatory. In Francis' case, however, the state habeas court did not reach the merits of his contention, but held instead that Francis had waived the right to challenge the validity of the grand jury selection procedure since he had failed to file an objection within the period specified by the applicable Louisiana rule of criminal procedure.[1] It is undisputed that neither Newman nor Fran-

1. The rule then applicable was contained in LSA–R.S. 15:202:
> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall

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cis timely challenged their indictments on the basis of unconstitutionally constituted grand juries.

Failing to obtain relief in the Louisiana courts, the prisoners sought writs of habeas corpus in federal court pursuant to 28 U.S.C.A. § 2254. In each case the district courts concluded that the State had failed to show that the petitioners had deliberately by-passed state procedures and had failed to rebut the prima facie showing of discrimination in selecting grand juries. The district court which granted relief to Francis found alternatively that the petitioner had a "viable explanation" for his failure to file a timely challenge to the indictment. The court reasoned that if the matter had been presented by a *federal* prisoner seeking to avoid the waiver provision of F.R.Crim.P. 12(b)(2), the court would have found "cause" within the meaning of that Rule so as to justify relief.[2] The factual basis for the court's finding was that Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the time for challenging the indictment to pass without objecting to the grand jury's composition.

In appealing from the grant of federal habeas relief to Newman and Francis, Louisiana argues that the district courts erred by applying the "deliberate by-pass" test of Fay v. Noia, 1963, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, rather than the waiver-by-failure-to-object principle set forth in Davis v. United States, 1973, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216. In *Davis* the Supreme Court held that failure to raise an objection to the indictment prior to trial barred

be considered as waived and shall not afterwards be urged or heard.

The statute has since been repealed and replaced by LSA–C.Cr.P. art. 535.

2. F.R.Crim.P. 12(b)(2) provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

consideration of the alleged defect in the indictment in a collateral attack, unless the court found "cause shown" to excuse the operation of the express waiver provision. Although the *Davis* decision was rendered prior to the federal district courts' disposition of these cases, the record shows that the district judge in acting on Newman's petition did not consider *Davis* at all. The apparent reason for this omission is that the court relied on a magistrate's report prepared prior to the Supreme Court's opinion in *Davis*. On the other hand, the district court which granted Francis' petition considered the *Davis* holding, but accepted the distinction now urged by both Francis and Newman, that the decision concerned a federal prisoner and therefore has no application to a *state* prisoner seeking *federal* habeas relief.

This Circuit has already rejected the attempt to limit *Davis* to its precise facts. We recently affirmed the denial of a federal habeas petition challenging the selection of a Louisiana grand jury on the basis of the waiver provision contained in the present Louisiana rule.[3] Jones v. Henderson, 5 Cir. 1974, 494 F.2d 47. *See also* Marlin v. Florida, 5 Cir. 1974, 489 F.2d 702; Rivera v. Wainwright, 5 Cir. 1974, 488 F.2d 275.

[1] The record before us in Newman's case discloses nothing that would take his federal habeas claim outside the reach of *Davis* and our decision in Jones v. Henderson, *supra*. Therefore, we vacate the order of the district court and remand the case with directions to dismiss Newman's petition for habeas corpus.

Francis' petition, however, raises a more troublesome issue. Unlike the Florida waiver provision considered in *Rivera* and *Marlin*, *supra*, which is identical to Rule 12(b)(2), the Louisiana rule now before us purports to be absolute; that is, there is no "cause shown" exception comparable to the provision in the rules which we have previously considered.[4] The difference in

3. *See* note 1, *supra*.

4. The *Jones* opinion did not discuss the issue of whether non-compliance with the present Louisiana rule might be excused, although the

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procedural provisions requires an examination of the exception to the waiver-by-failure-to-object principle.

The Supreme Court in *Davis* accepted the district court's determination that there had been no "cause shown" to justify relief from the waiver provision of Rule 12(b)(2). The lower court's findings of fact persuaded the Supreme Court that Davis had not been prejudiced by the allegedly unconstitutional grand jury selection procedure. In recognition of the Rule's provision that a showing of prejudice overrides the interest of having an "airtight system of forfeitures," the Court stated:

> The presumption of prejudice which supports the existence of the right [as in Peters v. Kiff, 1972, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83] is not inconsistent with a holding that *actual prejudice* must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

Davis, supra, at 245 (emphasis supplied).

[2] We believe that such an exception must be engrafted on the Louisiana statute to allow a federal habeas court to excuse noncompliance with state procedural requirements when the petitioner can demonstrate actual prejudice. The state's interest in requiring the timely filing of motions, especially motions which may abort a criminal prosecution, is indeed strong. But the countervailing concern was expressed by the Supreme Court in Fay v. Noia, *supra,* at 431: "Of course orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such [a] procedure. But that state interest 'competes . . . against an ideal . . . [the] ideal of fair procedure.'"

By way of illustration, consider a hypothetical twist on the factual situation present in *Davis.* In that case, the petition-

Court did note that the petitioner had been represented by competent counsel. *Cf.* Tollett v. Henderson, 1973, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235.

er, a black, was indicted along with his two white accomplices. The case against him, the district court found, was a strong one, although largely circumstantial. Moreover, ample evidence was adduced to justify a grand jury's determination that Davis should stand trial. If, unlike *Davis,* however, an unconstitutionally selected grand jury had chosen not to indict the white participants but instead to indict only the black perpetrator, and if a collateral attack on the underlying conviction was made which seriously challenged the sufficiency of the evidence even to indict, a federal court would not be powerless to grant habeas relief. Fundamental fairness requires that a federal court be able to remedy such a wrong in spite of a procedural defect such as failing to file a timely objection to the indictment, assuming, of course, that noncompliance with the state rule was not merely a deliberate tactical maneuver.

[3] We conclude, therefore, that the Louisiana waiver provision must be given effect by the federal district courts unless there is a showing of actual prejudice. Consequently, the order of the district court granting Francis' habeas petition must be vacated, and the case remanded to permit a determination of whether the facts presented by Francis constitute a showing of prejudice which would excuse his non-compliance with the state's rule of criminal procedure.

Vacated and remanded with directions to dismiss with respect to Newman. Vacated and remanded for further proceedings consistent with this opinion with respect to Francis.

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Appendix B

MEMORANDUM OF REASONS (No. 72-719 "G")

(Title Omitted)

Filed: Sep. 20, 1973

When 17 years old the petitioner, represented by court appointed, uncompensated counsel, was convicted by jury of murder. On June 29, 1965, he was sentenced to life imprisonment. No direct appeal was taken.

In September of 1970, the petitioner requested a copy of his transcript for the purpose of perfecting an appeal. This request was refused. Petitioner filed a habeas petition in State trial court contending that: (1)

(1) he was deprived of his right to an appeal and access to his transcript; and (2) the grand jury which indicted him was defective since negroes were systematically excluded from service.

The State court with regard to the first contention, held that the petitioner's failure to file the proper pre-trial motion was fatal to that contention. Moreover, the right to challenge the constitutionality of the grand jury had prescribed.

The petitioner's application for writs of certiorari and habeas corpus to the Supreme Court of Louisiana on these issues was denied. Therefore, it appears that the petitioner has exhausted his available state remedies with regard to these issues.

The question before this Court is twofold: (1) did the petitioner waive his right to an appeal; and (2) does systematic exclusion of negroes from the grand jury constitute grounds for habeas relief despite an apparent failure to timely raise the issue in state court.

Firstly, the State courts may have erred in holding that the petitioner waived his right to an appeal.

In a decision from this Circuit as early as 1938, the United States Supreme Court held that courts should indulge every reasonable presumption against the waiver of constitutional rights, Johnson v. Zerbst, 1938, 304 U. S. 458. It does not appear that any such indulgence was made with regard to this petitioner. This concept was reiterated in Fay v. Noia, 1963, 372 U.S. 391,

391, when the Supreme Court held that the petitioner had not waived his right to an appeal. At a 1971 evidentiary hearing there was conflicting testimony concerning the petitioner's waiver of his appeal, the implication being, however, that the waiver was made by the petitioner's court appointed attorneys over his objections.[1] Furthermore, the excerpt from the sentencing

[1] A. "We told him we wouldn't take an appeal and he told his family that he kept hollering for an appeal."
(Hearing transcript 25)
* * * *
Q. "The defendant wanted an appeal and you and Mr. Tureaud advised him against it?"
A. "Under the circumstances, yes."
Q. "How old was he at the time, if you recall?"
A. "He was seventeen the day of the trial. He was sixteen when the act was supposed to have occurred."
(Hearing transcript 26)
* * * *
Q. "Did the defendant still persist that he wanted to appeal?
A. "Well, I think his parents imposed it upon him. He was a minor at the time and they followed our advice. Francis is a man but he was a terrified, young seventeen year old. I think that after a length of time he just sat there."
Q. "Do you know if the Court informed him upon sentence that he had a right to appeal?"
A. "The Court didn't inform him about anything."
(Hearing transcript 28)
* * * *
Q. "Did you and Mr. Tureaud in fact advise the defendant he had a right to appeal in this case?"
A. "After all of that kind of noise being made we told him he had a right to appeal. We didn't say any of those words, you can go up higher. It is best that you take this sentence, the jury saved your life and that's it. All of this about you have

proceedings indicates that the sentencing court failed to determine whether or not petitioner's waiver was an "intentional relinquishment of a known right or privilege," as was required at the time per *Fay* and *Johnson*, both supra.[2]

Secondly, although the petitioner is precluded from raising the issue of the constitutionality of the grand jury which indicted him in state court because of procedural impediments, he is not so estopped in this Court. Louisiana State law requires that objection be made "before the third judicial day of the term of which said jury shall have been drawn, or before en-

a right to appeal, we don't do it, nobody else was doing it that day. . . ."
(Hearing transcript 29)
* * * *
Q. "You were negotiating a plea bargain at that time?"
A. "I don't know what you call it."
Q. "What would you call it?"
A. "I don't know."
Q. "I am asking you what you would call it."
A. "We were doing the best at that time for our client."
Q. "That's bargaining?"
A. "I don't know, a deal I guess you would call it."
(Hearing transcript 41)
Later the chief prosecutor was asked whether he engaged in any type of bargaining and he answered:
A. "No, Mr. Winsberg, I don't for this reason. I could have really cared less. . . ."
(Hearing transcript 84)

[2] The determination by the trial judge as to whether the petitioner's waiver was an intentional relinquishment of a known privilege was merely the question:
A. "Does this defendant state at this time he does not intend to take an appeal?"
and the answer:
A. "I am not."

tering upon the trial of the case if it began sooner."[3] Obviously, the petitioner cannot now challenge his grand jury in state court. However, barring some intentional relinquishing or abandonment, there has been no waiver as far as the federal courts are concerned. *Hamilton v. Watkins*, 5th Cir. 1970, 436 F.2d 1323. See also *Fay v. Noia*, supra; *Johnson v. Zerbst*, supra; and *Labat v. Bennett*, 5th Cir. 1966, 365 F.2d 698. This trilogy of cases involves the precise question of waiver and all hold that there must be an intentional relinquishment of a known right or privilege, an element not apparently here.[4] It is also noted that with the exception of *Labat* all of these cases preceded the petitioner's trial.

For the above stated reasons, therefore, it is this Court's determination that the petitioner did not waive his right to an appeal. This question, however, appears moot since this court finds his indicting grand jury constitutionally defective. Although, according to state law, he may have waived his right to contest the constitutionality of his grand jury in state court, he has not so waived the right to raise the same question in federal court. Petitioner's failure to comply with state procedural rules bars consideration on the merits in any state forum as a matter of state law. Since, how-

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[3]LSA-R.S. 15:202.

[4]In *Fay* the waiver pertained to the right to appeal, in *Johnson* it pertained to counsel, and in *Labat* it was pertaining to a challenge of the jury system. * It is noted that although the petitioner was represented by counsel, his chief counsel had not been associated with criminal cases for many years. Moreover, he was in failing health at the time. As in *Labat*, this may explain the failure to timely raise this issue.

ever, a federal question is involved, whether petitioner's due process and equal protection rights were violated by the systematic exclusion of negroes from his grand jury, there is no bar to determination of this question in a federal habeas corpus proceeding. See *Noia*, *Labat*, and *Hamilton*, all supra. Moreover, *Labat* mandates such action.

It is noted that the State argues that the recent U.S. Supreme Court case, *Davis v. United States*, 1973, 93 S.Ct. 1577, precludes the petitioner from now challenging the validity of his grand jury by way of habeas corpus.

In *Davis* the Supreme Court, in a federal criminal case, held that the standards applied in habeas corpus should be no less lenient than those in the proceeding itself. Mr. Justice Rehnquist, however, also held in his majority opinion that "We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that rule may not later be resurrected, either in the criminal proceedings or in federal habeas in the absence of the showing of "cause" which that rule requires."

The situation in this case differs greatly from the situation in *Davis* and for this reason this Court cannot apply the *Davis* rationale.

Firstly, as was previously discussed, this Court fails to find that there was a waiver.

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Secondly, assuming arguendo, that mere failure to raise the issue, as per the rules of procedure, constituted waiver this Court would find "cause" which would justify relief. In Davis, the " 'Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury.' " In the case at bar the petitioner has a viable explanation.*

Thirdly, as Judge Christenberry held in *U. S. ex rel Bruce Barksdale v. C. Murray Henderson*, E D. La. 1973, CA 71-2411, *Davis* should be read with *Tollett v. Henderson*, 1973, 93 S.Ct. 1602. The *Tollett* Court held that the issue of whether grand jury exclusion might be raised on federal habeas after a plea of not guilty and trial by jury is an open question. Accordingly, Judge Christenberry held "In the absence of further elucidation on this question from the Supreme Court, the law in this Circuit remains that a state prisoner is not precluded from raising the issue of racial exclusion by way of habeas corpus. See e.g., Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966)."

It is apparent, from the information and statistics provided by the Magistrate's report, that the conclusion that the grand jury was defective is inescapable. The same practices condemned in *Labat* were extant at the time of the petitioner's indictment.* In *Labat* the Court said:

*See the Criminal District Court's order denying habeas relief. Trial record p. 3

"We find this explanation unacceptable. (A) The exclusion of daily wage earners as a class violates the petitioner's due process and equal protection rights to an impartial jury representing a cross-section of the community. (B) The exclusion of this large class, 47 per cent of all Negro workers in Orleans Parish, as the district judge found, discriminates against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of Negroes. (C) Contrary to the district court's holding there is no Louisiana statutory authority permitting jury selection officials to exempt daily wage earners as a class."

Accordingly, this Court is forced to order the conviction of the defendant set aside and to require the State to re-indict and retry the defendant, assuming the State is so inclined. In the event the State does not proceed to re-try the defendant within 180 days, then petitioner's counsel should bring a motion before the Court asking for the defendant's full and final release from custody. The Court retains jurisdiction.

Sept. 20, 1973

*The practice referred to is that of excluding hourly wage earners which, in effect, limited the number of blacks in the pool of potential jurors. See Magistrate's Report p. 4.

/s/ JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

Lolis Elie, Esq.
George M. Strickler, Esq.
Russell J. Schonekas, Esq.
G. Thos. Porteous, Jr., Esq.
Abraham Francis
C. Murray Henderson, Warden

ORDER (No. 72-719 "G")

(Title Omitted)

Filed: Sept. 20, 1973

Based on the Memorandum of Reasons filed herewith,

IT IS ORDERED that the application for a writ of habeas corpus by the petitioner Abraham Francis be, and the same is hereby, granted, but execution of the writ and release of the defendant is postponed affording the State of Louisiana 180 days from the date of this order within which to indict and try the defendant, failing which counsel for the petitioner should bring forth a motion for the full and final release of the petitioner Abraham Francis.

September 20, 1973.

/s/ JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

October 7, 1974

TO ALL COUNSEL OF RECORD

Re: 73-3670 FRANCIS V. HENDERSON

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Gene G. Parent
Deputy Clerk

cc: Mr. Shirley G. Wimberly, Jr.
Ms. Louise Korns
Ms. Barbara Rutledge
Ms. Lolis Elie
Mr. George M. Strickler

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 74-5808

ABRAHAM FRANCIS,
Petitioner

—*v.*—

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1975
CERTIORARI GRANTED APRIL 28, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-5808

ABRAHAM FRANCIS,

Petitioner

—*v.*—

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Ca No. 72-719 "G"

ABRAHAM FRANCIS

versus

C. MURRAY HENDERSON

DATE	PROCEEDINGS
3-3-72	Flg. Petition for Writ of Habeas Corpus . . . Order EGW . . . allowing the petitioner to file Informa Pauperis
3-3-72	Entg. M.E. EGW . . . this matter is Transferred to U.S. Dist. Ct., New Orleans, Division . . . issuing notice . . . entg. 3/9/72.
6-9-72	ORDER (RBW) of Refer. to U. S. Mag. I.O.J. Ent. 7-9-72.
8-3-72	ORDER FOR CLARIFICATION (IOJ) 7-31-72. Petitioner to file various items within 15 days. Ent. 8-3-72.
8-11-72	M.E. & ORDER (IOJ) granting petitioner until 8-25-72 to answer Order of Clarification. Ent. 8-14-72.
8-16-72	Statement of Petitioner in accordance with Order for Clarification.
8-25-72	ORDERED that respondent file with the court within 15 days copies of the following etc. Further ORDERED that respondent shall state the reasons why an evidentiary hrg. should not be held by this Court on the claim made in the petition for habeas corpus. (USMAG. IOJ) 8-28-72
8-29-72	MR on Order returned unexecuted on 8-28-72 a/c no service requested by US Mag.
9-18-72	Answer of C. Murray Henderson to Order of 8-25-72.

DATE PROCEEDINGS

11-30-72 ORDER FOR CLARIFICATION (IOJ) 11-29-72, petitioner to file various items within 15 days, Ent. 12-1-72.

12-15-72 Statement of Petitioner in answer to Order for Clarification.

2-14-73 M.E. & ORDER (JAC) that Lolis Elie is appointed as counsel for petitioner & that a conference is set for 3-7-73 at 11:30 a.m., Ent. 2-16-73.

3-9-73 ORDER to Show Cause & Notice of Evidentiary Hrg (IOJ) on 3-27-73 at 10 a.m., & that Respondent show cause at that time why relief in the H C should not be granted. Ent. & issued copies 3-12-73.

3-20-73 M.R. on Order to Show cause, served J. Garrison thru Frank Klein on 3-16-73, & W Guste thru L. Harley on 3-14-73.

4-4-73 M.R. on order to show cause exec. to C. Murray Henderson on 3-26-73.

5-9-73 M.E. & ORDER (IOJ) that an evidentiary Hrg will be held on 5-25-73 at 10 a.m., ent. 5-9-73.

5-16-73 M.E. & ORDER (IOJ) Pre-trial conference set for 5-22-73 at 2 p.m. Clerk of Court to issue Writ of HC for petitioner to be at Parish Prison on 5-23-73 to see his atty etc., & at Court on 5-25-73, etc., Ent. 5-16-73, issued writ to U.S. Marshal.

5-23-73 M.R. on Writ on H.C., served on Warden, Angola, La. thru D. Rabalais on 5-21-73.

5-24-73 M.E. & ORDER (IOJ) 5-23-73, pre-trial conference held 5-22-73, petitioner made mtn to continue: Oral mtn is DENIED. Ent. 5-24-73.

5-29-73 M.E. & ORDER (IOJ) 5-25-73, evidentiary hrg held this date. Same continued to 6-18-73 at 9 a.m. & petitioner to stay at Parish Prison until hrg date., etc., ent. 5-29-73.

6-1-73 Petitioners request for subpoenas, issued (2).

DATE PROCEEDINGS

6-1-73 Petitioners Mtn & ORDER (SEAR) 6-1-73, that U.S. Marshal of E.D.La. pay all witness fees and service costs for no more than (6) subpoenas to be issued on behalf of petitioner. Ent. 6-5-73.

6-8-73 Mtn & ORDER (10J) 6-7-73, that George M. Strickler, Jr. is associated as counsel for petitioner in this action. Ent. 6-11-73.

6-7-73 M.R. on subpoenas, served L. Korns thru L. Panzeca on 6-4-73, S. R. Plotkin on 6-6-73, & J. L. Murphy on 6-4-73.

6-14-73 Petitioners Mtn & ORDER (10J) 6-12-73, that Professor John E. Diem is appointed as the Courts expert witness to assist it & counsel in analysis of evidence in this case. Ent. 6-12-73.

6-14-73 ORDER (10J) 6-12-73, appointing Professor John E. Diem as expert witness. Ent. 6-15-73.

6-26-73 M.E. & ORDER (JAC) 6-25-73, further evidentiary hrg held this date, & completed, Petitioner Abraham Francis to be returned to La. State Penitentiary, Angola, La. ent & issued copies 6-26-73.

6-26-73 M.R. on subpoena, unserved to Earl Amedee.

8-28-73 M.E. & ORDER (JAC) 8-28-73, conference set for 9-5-73 at 1:45 a.m. all counsel must be present. Ent. 8-28-73.

9-20-73 Memorandum of Reasons, (JAC) 9-20-73, this Court is forced to order conviction of deft set aside & to require State to re-indict & re-try deft within 180 days, if not, counsel should bring a mtn for defts full & final release. The Court retains Jurisdiction. Ent. 9-21-73.

9-20-73 ORDER (JAC) 9-20-73, that application for writ of habeas corpus by petition Abraham Francis is GRANTED, but execution of the writ & release of deft is postponed affording State of Louisiana 180 days from this date to indict & retry deft, etc., failing to do so, defts counsel should file mtn for full & final release of deft. Ent. 9-21-73.

DATE PROCEEDINGS

10-1-73 Deft State of La. Mtn & ORDER (JAC) 10-5-73, that execution of the final judgment, opinion & Order ent. 9-20-73 in this action is stayed pending exhaustion of the State of La., deft of all its appellate remedies. Ent. 10-9-73.

10-10-73 NOTICE OF APPEAL by State of Louisiana from Order of 9-20-73.

10-10-73 Appeal bond by State of Louisiana in sum of $250.00.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA

ANSWER (No. 72-719 "G")

(Ttitle Omitted)

Filed: Sep. 10, 1972

Now into Court comes respondent, C. Murray Henderson, appearing herein through the undersigned Assistant District Attorney for the Parish of Orleans, and for answer avers:

I

Petitioner has caused to be delivered for use of this Court the entire record of his case in the Criminal District Court for the Parish of Orleans, to-wit: NO. 187-385 "G".

II

Included is a copy of the judgment of the trial court on petitioner's original Application For Habeas Corpus, which judgment is adopted by respondent and made a part hereof.

III

Attached is a copy of the transcript of petitioner's State court evidentiary hearing.

IV

Reference to the transcripts mentioned above discloses that not only was petitioner not deprived of his right to appeal, but he made an intelligent waiver of such right in open court after consulting with his two attorneys and members of his family.

V

Petitioner was not entitled to a transcript of the record of his trial under State law and even if he were so entitled, his request came some five years too late.

VI

Although petitioner neglected to reply to paragraph 7 of the Court's order for clarification, the record will reply for him: His two attorneys filed complete pleadings, including a Motion to Quash. They did not attack the make-up of the Grand Jury which returned the indictment in the case, either on grounds of exclusion of members of petitioner's race, or on any other grounds. Since these two negro attorneys were noted for their vigorous attacks upon the composition of "lily-white" juries during their long careers, it may be fairly assumed that the ground now set forth by petitioner was seriously considered by them prior to rejecting same in favor of the ground chosen by them to allege in the Motion To Quash. In any event, petitioner not having urged the allegedly vicious composition of the Grand Jury at the trial level could not under Louisiana law have raised the issue on appeal, even had he prosecuted one, and should not be permitted to do so now.

WHEREFORE, respondent prays that the petition of Abraham Francis be denied and his suit be dismissed with prejudice.

/s/ Shirley G. Wimberly, Jr.
SHIRLEY G. WIMBERLY, JR.
Assistant District Attorney
2700 Tulane Avenue
New Orleans, Louisiana 70119
Telephone: 822-2414

BILL OF INFORMATION

The State of Louisiana
Parish of Orleans

Criminal District Court For The Parish of Orleans

No. 187-385-G

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one JERRY ANDERSON, PAUL HONORE, SR. ABRAHAM FRANCIS, late of the Parish of Orleans on the 5th day of November in the year of our Lord, one thousand, nine hundred sixty-four with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans murdered one RONALD JOSEPH LANGSTON. June 24, 1965 New Orleans, La. Guilty without capital punishment as to Abraham Francis.

/s/ ROBERT E. MURPHY
Foreman

contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

/s/ D'ALTON WILLIAMS
Assistant District Attorney for
the Parish of Orleans.

June 23rd., 1965

The Defendants Jerry Anderson and Paul Honore Sr., withdraw their former pleas of Not Guilty and tendered to the Court pleas of Guilty to R. S. 14-31 (Manslaughter). These pleas were acceptable to the State. The Court ordered the pleas recorded and after the Defendants waived all legal delays the Court sentenced each of the Defendants to serve Eight (8) Years at hard labor in the State Penitentiary. The Court ordered the sentence as to Jerry Anderson to run concurrently with any other sentence he may be serving. Jerry Anderson was said to be 21 years of age born January 27th., 1944 in the State of Louisiana. Paul Honore, Sr., was said to be 22 years of age born July 30th., 1942 in the State of Louisiana.

/s/ M. T. Gonzales
Minute Clerk "G"

No. 187-385

Section "G"

STATE OF LOUISIANA

versus

JERRY ANDERSON, PAUL HONORE, SR. &
ABRAHAM FRANCIS

INDICTMENT FOR VIOLATION OF R.S. 14:30

A True Bill

/s/ [Illegible]
Foreman of Grand Jury

New Orleans, December 10, 1964

Returned into open Court and recorded and filed Dec. 10, 1964

/s/ Helen Sullivan
Minute Clerk

Each Arraigned 12/16 1964 and each pleaded Not Guilty 15 days for Pleading.

/s/ M. J. Gonzales
Minute Clerk

Dec. 10, 1964

Alias Capias issued as to all defendants—no bail.
Helen Sullivan, M Clerk "G"

1/28/65 Continued by Defense to be reassigned.
M. J. Gonzales M Clerk "G"

4/14/65 Continued by Defense to be reassinged.
M. J. Gonzales M Clerk "G"

6/22/65 Filed motion for severance as to Paul Honore, Sr. and Jerry Anderson.

M. J. Gonzales M Clerk G

6/23/65 Motion for severance as to Paul Honore, Sr., and Jerry Anderson, Granted.

M. J. Gonzales M Clerk G

6/29/65 The Defendant Abraham Francis appeared at the bar of the Court attended by his counsel for sentence. The Court sentenced Abraham Francis to serve the rest of his Natural Life at hard labor in the Louisiana State Penitentiary. Abraham Francis was said to be 17 years of age born July 10th., 1947 in the State of Louisiana.

/s/ M. J. Gonzales
Minute Clerk "G"

6/10/71 Filed Writ of Habeas Corpus as to Abraham Francis Court appt. Jerome Winsberg. Hearing set 6/28/71

/s/ Elmo Sanchez
M. Clk.

PARISH OF ORLEANS

No. 187-385-G

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

73-3670

THE STATE OF LOUISIANA) ss.

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one

JERRY ANDERSON
PAUL HONORE, SR.
ABRAHAM FRANCIS

late of the Parish of Orleans on the 5th day of November in the year of our Lord, one thousand, nine hundred sixty-four with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans murdered one RONALD JOSEPH LANGSTON

June 24, 1965 New Orlenas, La. Guilty without capital punishment as to Abraham Francis.

/s/ Robert E. Murphy
Foreman

contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

/s/ D'Alton Williams
Assistant District Attorney for the Parish of Orleans.

APPLICATION AND ASSIGNMENT OF COUNSEL

Office of Clerk of the Criminal District Court
for the Parish of Orleans
Edward A. Haggerty, Clerk

February 9, 1965

No. 187-385 SECTION G
CHARGE VIO. R.S. 14-30

I do solemnly swear that I am charged with a felony in the above case. I am unable to procure or employ counsel and ask that the Court assign counsel in my case to represent me.

/s/ Abraham Francis
ABRAHAM FRANCIS

Sworn to before me
MIN. Clerk

Considering the above application and in accordance with R. S. 15:143, the Court hereby assigns A. P. Tureaud, 1821 Orleans Avenue, New Orleans, Louisiana as counsel in the above case to represent and defend the said accused.

/s/ FRANK J. SHEA
Judge, Section G
Criminal District Court
Parish of Orleans

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

MOTION FOR A CONTINUANCE

(Number and Title Omitted)

On motion of A. P. Tureaud, Attorney for the Defendant, and on suggesting to this Court that in this case the Defendant is completed to move for a continuance, and does hereby so move, for the following reasons, to wit:—

Defendant was charged jointly with Jerry Anderson and Paul Honore from whom a severance was granted: that his defense requires the filing of motions appropriate to his defense.

IT IS ORDERED: that a continuance be granted in this case until the — day of ————————, 19–,

————————
Judge of Section ————

NEW ORLEANS, LA.
June 23, 1965.

/s/ A. P. TUREAUD
Defense Attorney

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

PRAYER FOR OYER

(Number and Title Omitted)

Filed: June 23, 1965

Now into Court, through undersigned counsel, comes Abraham Francis, defendant herein, and withdraw his formal plea of not guilty and prays for Oyer of the following:

1. Certified copies of all written statements and/or confessions that may have been made by the defendant, Abraham Francis, and which the State intends to offer at the trial of this case.
2. Certified copies of all oral or verbal statements and/or oral confessions that the defendant may have made and which has been taken down and transcribed either by the District Attorney's office or by the Police Department in their written reports of this case.
3. Certified copies of all notes made by the police concerning any oral admissions and/or statements that might have been made by the defendant and which the State intends to offer into evidence at the trial of this matter.

WHEREFORE, defendant, Abraham Francis, prays that he be furnished with:

1. Certified copies of all written statements and/or confessions that may have been made by the defendant, Abraham Francis, and which the State intends to offer at the trial of this case.
2. Certified copies of all oral or verbal statements and/or oral confessions that the defendant may have made and which has been taken down and transcribed either by the District Attorney's office or by the Police Department in their written reports of this case.

3. Certified copies of all notes made by the police concerning any oral admissions and/or statements that might have been made by the defendant and which the State intends to offer into evidence at the trial of this matter.

/s/ A. P. Tureaud

/s/ Earl J. Amedee
EARL J. AMEDEE

6/23/65
[ILLEGIBLE]

/s/ Frank J. Shea
Judge Section G

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

APPLICATION FOR BILL OF PARTICULARS

(Number and Title Omitted)

Filed: June 23, 1965

Now into Court through undersigned counsel, comes Abraham Francis, defendant herein, reserving his right to file other special pleadings herein and suggests to the Court that he is unable to properly prepare his defense herein until he is furnished with a Bill of Particulars upon the following:

1. The exact time that he is alleged to have committed the offense charged in the indictment?
2. The exact date that he is alleged to have committed the alleged offense charged in the indictment?
3. The exact place, by street and number, where he is alleged to have committed the alleged offense charged in the indictment?
4. Under what specific subsection of R.S. 14:30 is the defendant Abraham Francis charged?
5. Which of the enumerated crimes in subsection 2, of R.S. 14:30, if this is the applicable subsection did defendant allegedly participate in?

WHEREFORE, defendant prays that the State of Louisiana through the District Attorney be ordered by the Court to furnish the said Bill of Particulars and that service of the same be made on the defendant.

/s/ A. P. Tureaud

/s/ Earl J. Amedee
EARL J. AMEDEE,
Attorney for Mover

ORDER

IT IS ORDERED, by the Court that the District Attorney show cause on the —— day of ———— 1965, why this Bill of Particulars requested herein should not be granted.

NEW ORLEANS, LOUISIANA —— DAY OF ——, 1965.

6/23/65
[ILLEGIBLE].

MOTION TO QUASH THE INDICTMENT

(Number and Title Omitted)

Filed: June 23, 1965

Now into Court, through undersigned counsel, comes Abraham Francis, defendant herein, and withdraws his formal plea of not guilty with leave of this Honorable Court, moves to quash the indictment, for the following reasons, to-wit:

1. That the bill of indictment is too vague and indefinite and is not sufficiently specific to enable the defendant to prepare his defense and that the indictment merely states a conclusion of law. See *State* vs. *Verdin*, 187 So. 666.
2. That a short form of indictment has been used and the matters therein set forth are not sufficient in law to compel the defendant to answer, and is violative of Article I, Section 10 of the Constitution of the State of Louisiana of 1921, and is violative of the Sixth Amendment to the Constitution of the United States which reads in its pertinent part: ". . . In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and the cause of the accusation."

WHEREFORE, defendant prays that Judgment by the Court be decreed quashing, dismissing and discharging the said indictment.

/s/ A. P. Tureaud

/s/ Earl J. Amedee
EARL J. AMEDEE,
Attorney for Mover

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: Abraham Francis, who after being by me, first duly sworn, did depose and say:

That he has read the foregoing motion and that all the facts and allegations contained are true and correct.

/s/ Abraham J. Francis

SWORN TO AND SUBSCRIBED BEFORE ME THIS 23 DAY OF June, 1965.

/s/ A. P. Tureaud
Notary Public

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: Abraham Francis, who after being by me, first duly sworn, did depose and say:

That he has read the foregoing motion and that all the facts and allegations contained are true and correct.

/s/ Abraham J. Francis

SWORN TO AND SUBSCRIBED BEFORE ME THIS 23 DAY OF June, 1965.

/s/ A. P. Tureaud
Notary Public

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

MOTION TO SUPPRESS EVIDENCE

(Number and Title Omitted)

Filed: June 24, 1965

Now into Court comes Abraham Francis, defendant, through his undersigned counsel, and, protesting his innocence, objects to the introduction at this trial of defendant any written or oral confessions, statements, or admissions while under arrest and/or in custody, either in Birmingham, Alabama, or in New Orleans, Louisiana, or while enroute from Birmingham, Alabama to New Orleans, Louisiana, in that any statement, confession, or admissions, oral or in writing, were obtained from him at times and places when he was deprived of assistance of counsel, and, that he was denied the right to counsel in violation of constitutional rights guaranteed by the 6th and 14th Amendments to the Constitution of the United States. (Escobedo vs. State of Illinois, 378 U.S. 478; 84 S. Ct. 1758; United States, ex rel Russo vs. New Jersey, decided U.S. Court of Appeals, 3rd Circuit, May 20, 1965.)

WHEREFORE, defendant Abraham prays that any written or oral confessions, statements, or admissions made by him as set forth hereinabove be excluded.

/s/ A. P. Tureaud
A. P. Tureaud
Attorney for Abraham
Francis, defendant.

A. P. TUREAUD, being first duly sworn, deposed and said that he is attorney for defendant herein; that he has read the above and foregoing motion prepared by

him and that all of the facts and allegations therein contained are true and correct to the best of his knowledge, information and belief.

/s/ A. P. Tureaud

Sworn to and subscribed before me this 23rd day of June, 1965.

/s/ Earl J. Amedee

6/24/65
Motion to Suppress Denied

/s/ Judge Frank Shea

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

Proceedings held on June 29, 1965 in the case entitled State of Louisiana Vs. Abraham Francis.

MR. AMADEE:

May it please the Court, at this time counsel for the defendant has advised the defendant and he is ready for sentence. We would like to waive all delays and ask for immediate imposition of sentence.

THE COURT:

All right, get his age.

REPORTER'S NOTES: Stated his age to be seventeen, born July 10, 1947, New Orleans, Louisiana.

MR. AMADEE:

Francis, will you tell the Court that you are ready for sentence?

THE DEFENDANT:

Yes, sir, I am ready for sentence.

MR. AMADEE:

That you want to waive all delays and be sentenced and be sent away immediately.

THE DEFENDANT:

Yes.

THE COURT:

Does this defendant state at this time he does not intend to take an appeal?

THE DEFENDANT:

I am not.

MR. AMADEE:

That's right your honor, he is not.

(The Court sentences the defendant)

* * * *

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

TRANSCRIPT OF PROCEEDINGS

(Number and Title Omitted)

Transcript of proceedings had in the above-entitled matter on Monday, the 28th day of June, 1971 before the HONORABLE FRANK J. SHEA, Judge presiding.

APPEARANCES:

CLEMENT E. STORY, III, ESQ.
ASSISTANT DISTRICT ATTORNEY
FOR THE STATE OF LOUISIANA
JEROME WINSBERG, ESQ.
ATTORNEY FOR THE DEFENDANT

REPORTED BY:

Joe M. Riddle
Official Court Reporter

[3] BY THE COURT:

Abraham Francis.
Cal your witness, Mr. Winsberg.

BY MR. WINSBERG:

Call Earl Amadee.

BY THE MINUTE CLERK:

Raise your right hand. Do you solemnly swear that the answers you will give to the questions of the Court will be the truth, the whole truth and nothing but the truth, so help you God?

BY THE DEFENDANT:

I do.

DIRECT-EXAMINATION

BY MR. WINSBERG:

Q State your name and occupation, please, sir.
A Earl J. Amadee, my occupation is Attorney at Law.
Q How long have you been an attorney, Mr. Amadee?
A Twenty-two years.
Q Were you a qualified licensed member of the Louisiana State Bar Association on June 24, 1965?
A I was.
Q On June 24, 1965 and months preceding that date, did you represent one [4] Abraham Francis?
A Well, I can yeah and I would like to explain it. Mr. Touro,* Honorable Alexander Touro was appointed by the Court to represent him and since he hadn't handled a murder case in about fifteen years I agreed to assist him because I had handled many murder cases.
Q Were you retained by the defendant or asked by Mr. Touro to represent him?
A I was asked by Mr. Touro and it was agreed by the party that I would assist him. He was sixteen or seventeen at that time.
Q Did you ever talk—prior to Mr. Francis' trial, did you ever speak to him in regards of the case that was pending against him?
A Yes.
Q On how many occasions, if you can recall?
A Well, I was with Mr. Touro I would say about the best I can recollect two or three times.
Q Where did these interviews take place, if you recall?
A As best I can recollect, once or twice it was in Court while awaiting for trial [5] but previous to that, I think I must have seen him the back. I know I was with Mr. Touro on the two or three different occasions. We showed him the confession they said they had and talked about him being captured in Alabama.

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* Printer's note: correct spelling of Mr. Touro is Tureaud.

Q Mr. Amadee, I am going to ask you questions in regard to case number 287-385 which was allotted to Section G, Criminal District Court, Parish of Orleans which is alleging that three individuals including Abraham Francis murdered one Ronald Joseph Langston and my questions will be addressed that particular case.

A In my files that I have that one is—

BY MR. STORY:

May it please the Court, I would appreciate if Mr. Amadee only responded to questions asked by Mr. Winsberg.

BY THE WITNESS:

I thought I was.

BY THE COURT:

I thought he was trying to answer him. Go ahead.

BY THE WITNESS:

This indication down in my file is the [6] cake-eater case. Ronald was the cake eater.

EXAMINATION BY MR. WINSBERG:

Q That was the murder charge?

A Yes.

Q There were other charges against Francis at that time?

A For armed robbery. The wife—well, the woman that was supposed to have been robbed, a white woman by the name of Mrs. Cussamano.

Q These two cases, 187-385 and the armed robbery imminated from the same set of facts?

A And both of those cases as best I can recollect were in Section G.

Q You said that Mr. Touro was actually the defendant's chief Defense Attorney?

A I considered him as that but he counted on me quite a bit because I handled quite a few murder cases. I was Francis' lawyer, there was no denial of that fact.

Q You were co-Counsel?

A Yeah, and all the decisions were joint decisions.

Q I note, and I have been reviewing the [7] Clerk's file in this case and I note that various pre-trial motions were filed by you and by Mr. Touro and I refer specifically, first of all a prayer for oyer which is signed by you and Mr. Touro, a motion to quash the indictment which again is signed by Mr. Touro and on an application for Bill of Particulars which is signed by both you and Mr. Touro. Did you all work together in filing these three motions?

A That's correct. At the time he filed the motion to quash I had not come in the case. After I came into the case I advised him that I thought we ought to file a prayer for oyer and an application for Bill of Particulars.

Q I also notice a fourth motion which is a motion to suppress the evidence which includes any confessions that were obtained in the case.

A That's correct.

Q You were aware that those four motions were filed in the case?

A Definitely.

Q I would like to address my questions first [8] of all to the motion to quash the indictment which was filed over Mr. Touro's signature and your signature.

Now, as I understand it this motion is addressed to the—to two specific areas of law, number one that the indictment is vague and indifferent and therefore is unconstitutional and secondly that the short form of indictment was used and that that method of charging somebody for murder was unconstitutional.

A That's correct. In other words, I raised that type of motion for many many years and I still believe that it's good even though the Courts have overruled me, I always used it because I feel some day they will see it my way.

Q You have handled numerous murder cases, is that correct?

A I would think more than a hundred since I have been practicing law.

Q You had handled murder cases prior to 1965 when this case came up?

A Oh, yes, definitely.

Q Were you aware or had you any knowledge of the Eubanks case which was in existence [9] at that time?

A I knew about the Eubanks case.

Q Can you tell the Court is there any reason why you didn't attack the Grand Jury set up or the Petit Jury set up in Orleans Parish in your motion to quash?

A I would believe and not trying to pass the buck that Mr. Touro didn't want to do it. There were blacks on the Grand Jury and black in the Petit Jury panel and he has his own ideas about things, you know.

Q Did you all discuss that fact as whether you all should attack the Venire of the Grand Jury and the Petit Juries of Orleans Parish?

A I don't recal but like I said, if we did I am of the opinion he wouldn't have done it because Mr. Touro is a man that doesn't believe in what he calls wasted effort.

Q Did you feel at that time or you recall—this is six years ago, do you feel it would have been a wasted effort to file such a motion at that time?

A Like I told you, I wasn't in the case at the outset, I was representing a co-defendant [10] by the name of Jerry Anderson. It was only—I would say some several months before the trial that Mr. Touro asked me to come into the Francis case. Mr. Touro had been his attorney I would say maybe some four or five months before I came into the case. When you come into a case like that sort of haphazard things that have been done, you don't question them and apparently I didn't.

Q Were you aware that any attacks on the make-up of the Grand Jury and Petit Juries of Orleans Parish were being made at that time through the Labat and Merrit case?

A I knew they were being made and I made it in quite a few cases myself.

BY THE COURT:

Labat wasn't decided until August.

BY MR. WINSBERG:

It wasn't decided but it was in the makings at that time.

BY THE WITNESS:

It hadn't been made in the Barksdale case.

EXAMINATION BY MR. WINSBERG:

Q Would you state again, if you have already [11] stated the reason why you didn't make that attack?

A On the jury?

Q Yes.

A One thing I came into the case kind of late, I came in as a trial expert to help Mr. Touro to select juries and whatnot. Things done previous thereto was Mr. Touro's business. I did tell him I thought he ought to have a Bill of Particulars and Prayer for Oyer and he did that. I can't question what he did four or five months before I came in as a trial expert and that's my job.

Q Where is Mr. Touro today?

A He is seriously ill. I understand he just left the hospital and I don't know if he will ever—I hope so but only God knows if he will return to practice. He is very old.

Q Before, we discussed the other motions that you filed, you said that you were representing one of the co-defendants, Jerry Anderson?

A Also by co-appointment. That was my co-appointment.

Q I see that you filed a motion for severance [12] as to a Paul Honore (spelled phonetically) were you representing him?

A I didn't file that, that was filed by—

Q Adrian G. Deplanche?

A Apparently but a young man in his office, someone in his office filed that.

Q I am going to show you what is entitled a motion for severance which is contained in the Clerk's file and ask you if you also filed this motion for severance?

A All motions were to benefit all the defendants, so to gain everything, I signed it.

Q Is that your signature?

A That's definitely my signature.

Q Were you also representing Paul Honore (spelled phonetically)?

A No, only part of it was representing the co-defendants. At that time, it wasn't that sharp cut like now, you repreesnt one. We were sort of like co-counsel for everybody. That's the way it was in those days.

BY MR. STORY:

In the Honore (spelled phoneticaly) case, the District Attorney's file has one Mr. MacPherson on there.

[13] BY THE WITNESS:

That's the one that filed the motion. If you want to count me as a co-counsel, you can. I hate to say it, Honore was my client and I was trying to help him, he was related to me, Your Honor.

EXAMINATION BY MR. WINSBERG:

Q As far as you were concerned in your representation of this Jerry Anderson and your subsequent representation of Abraham Francis, was there a conflict of interest that existed?

A When you ask me if there was a conflict of interest, there were co-defendants and if you read the confession, the purported confession in the record, it looks like to me that they all sounded the same to me.

Q As far as you were concerned, there was no conflict?

A I know of no real conflict and Jerry's matter was finished before we tried the Francis case.

Q Jerry Anderson pleaded guilty to man-slaughter, is that correct?

A That's correct.

Q He received a term of years in the [14] penitentiary?

A That's correct, so did Honore (spelled phonetically).

Q Was there any reason why this man didn't plead to man-slaughter, Francis?

A Sure, there is a reason, the State was out to put him in the electric chair. They asked it in the trial several times, "in this case, we ask of the electric chair".

Q The fact that he was sixteen years old at that time—

A None at all, they were trying to put him in the electric chair.

BY THE COURT:

I don't see the relevancy of that.

BY MR. WINSBERG:

He was sixteen and I know that was a problem of a defendant, he can't plead to man-slaughter and that in itself might be a denial of certain Constitutional rights.

EXAMINATION BY MR. WINSBERG:

Q Mr. Amedee, let me ask you about this motion to suppress the evidence which was filed by Mr. Touro. Were you present at any hearing that was had in reference [15] to this motion to suppress the evidence?

A Could you give me the date of that motion?

Q The motion to suppress was filed on 6/24/65. What was the date that the hearing was had if there was one?

A Since you have given me the date, I can tell what I think happened and what I recall happening.

Q Let's get the date when the actual hearing was made. Do you have the date?

A This was filed the morning of the trial and was refused.

Q Was there a hearing?

A No, there was no hearing. He filed it and put it in the record, it was refused.

Q That motion to suppress the evidence was filed on the date that the trial began?

A The morning of the trial, that's right.

Q Did you discuss this motion with Mr. Touro and with the defendant prior to filing it?

A I don't recall discussing it with the defendant, he was a sixteen or seventeen year old youngster. If it was filed, I would say yeah I discussed it with Mr. Touro.

Q It contends in these motions that alleged [16] confession was produced—as a result of the prayer for oyer—was perhaps contained in an unconstitutional manner, is that correct?

BY MR. STORY:

Objection to this. This matter is going back to trial six years hence. The motion and the reasons for the motions are contained in the Clerk's file at that time and I don't believe we have to expound upon them at this time.

EXAMINATION BY MR. WINSBERG:

Q Did you feel it was a valid motion?

BY THE COURT:

There is nothing in this writ about what you are talking about.

EXAMINATION BY MR. WINSBERG:

Q After review of the Clerk's file, apparently the motion to suppress was not filed in this matter. Do you have any recollection of that, Mr. Amedee?

A It's in the record.

Q All I can do—

A If it's in the record, it was filed. I don't see what it's doing in the record, if it wasn't filed.

Q Do you recall if there was an evidentiary [17] hearing?

A I said there was no hearing, it was filed the morning of the trial. It was denied by the Judge and I filed it in the record.

Q I see a notation on the motion where it was denied by the Judge.

A That's what I said.

Q It was denied without hearing?

A That's correct.

Q Is there any reason why you and Mr. Touro waited until the morning of the trial to file this motion?

A I know of no other reason than this, that I was called in the case to try the matter with Mr. Touro, any motion or whatnot that he filed. I gave him the advise that I gave him but he was the chief counsel. He did all the questioning and whatnot. During the trial the Court told me that Mr. Touro is the chief counsel, help him but let him ask the questions.

Q To get this entirely clear for the record, you and Mr. Touro filed the motion to suppress the confession and certain evidence on the morning of trial and the [18] Judge denied it?

A Correct.

Q Without hearing?

A Without hearing, correct.

Q Do you know of your own knowledge any reason why Mr. Touro, after being appointed four months hence did not file this motion sooner?

A Mr. Touro is a great civil lawyer, he hadn't handled any criminal matters for years. That's all I know.

Q From you feel in this case, did you feel this was a valid motion?

A We felt it—

Q Do you recall if you and Mr. Touro filed it just to be dilatory?

A No, not to be dilatory.

BY THE COURT:

When is the date that the motion to quash was filed?

BY MR. WINSBERG:

I was going to go into that.

EXAMINATION BY MR. WINSBERG:

Q I note on your application for Bill of Particulars the minute entry reflects that it was filed on 6/23/64 which would have been the date before trial. Do you [19] have any recollection of that?

A As best I recollect in this Court, the Court will let you file motions even the day before trial if a matter had been set for trial and you still have to go to trial the day it's set. That's the only reason I know.

Q Do you recall if there was an actual hearing on the application for Bill of Particulars?

A The State filed its answer and the Judge asked us,—you know, like we usually go through a type of hearing.

Q Do you recall if the State filed an oral or written answer?

A Apparently they gave us the information we wanted. If you note on the motion that we accepted the answers.

Q Mr. Amedee, I don't see any written answers of the State in this record.

A It must have been oral. You will see on the record where it says—

BY THE COURT:

What does it say on the Bill of Particulars?

EXAMINATION BY MR. WINSBERG:

Q I will refer you to a notation on the application for Bill of Particular on the [20] bottom, it says 6/23/64 which apparently is a wrong date because the bill was not filed until October of '64. Then, secondly, it says State's answers good and sufficient and there is a signature that I can't read.

BY THE COURT:

It must be my signature.

EXAMINATION BY MR. WINSBERG:

Q I show this to Mr. Amedee.

A Yeah, that's correct. Apparently, they answered us orally if the answer is not in the record. I am not saying they answered us orally since the written answers are not in the record.

Q Neither you or Mr. Touro asked that the State answer in writing so there would be a proper record?

A I don't recall.

Q Now, I am going to ask you about the motion to quash the indictment which was apparently filed on 6/23/65 and ask you if you recall filing that one which would have been the date before trial?

A Yes.

Q Do you recall arguing that particular motion?

A I would think that there was a brief argument. [21] We had been called that day to wind up the motions because we were going to trial the next day so there might have been an argument.

Q Had you at any time been instructed by His Honor Judge Shea to have all your motions filed one day prior to the trial?

A I would think, yes.

Q You know or do you recall?

A I don't recall but I think it's apparent since we argued them and filed them on the 23rd. There must have been some reason for it. The only reason was we were going to trial the next day.

Q Again, as to the prayer for oyer, it was filed 6/23/65 and that it states answers was good and suffient. Do you recall if the State filed written answers to that?

A The State gave us a confession, a written, purported confession. I would say that if you check the transcript we objected to the oral confession but were not given them. We asked for them but weren't given them. Under the [22] law, which is still the law and naturally, we reserved exceptions.

Q Apparently, in the four motions, three of them were filed the day before trial and the motion to suppress was filed the morning of trial?

A Correct.

Q Three of them were heard but the fourth, the motion to suppress was not heard?

A What you'd call it—heard. If he says it's denied, what are we going to do?

Q Did you reserve bills?

A I would think yes, I think the transcript will reflect that.

Q Are you saying you haven't had the benefit of seeing a transcript?

A Not in six or seven years.

Q Have you seen a transcript?

A There was no transcript, the stenographer took notes and covered it. Without an appeal, there was no transcript.

Q Did you actually try this case with Mr. Touro?

A Yes.

Q How long did the trial last, if you recall?

A One day.

Q One full day?

[23] A Yeah.

Q Started on the 24th and ended on the 24th?

A As best I can recollect, yeah and the jury—the jury went out, as best I can recollect it was some time later that day that they came back with their verdict of guilty without capital punishment.

Q At the trial of this case, did you raise the issues that are contained in the motion to suppress again as to the confession and as to any allegedly illegally obtained evidence?

A As best I can recollect, I would say that the confession, the purported confession which is more or less oral that was taken in Alabama, we bitterly objected to that during the trial of the matter. The confession that's in writing that was taken in the detective bureau, if I could recall, we objected to that because he didn't have the benefit of counsel. At the time, we didn't believe he was properly warned about his rights at that time.

Q Do you recall if you reserved bills as to that?

[24] A I always reserve bills to those things.

Q Again, did you feel those motions were well taken?

A I know today, I think they were well taken.

Q At the conclusion of the trial, when the defendant was found guilty, did you still feel that those two motions and bills were well taken?

A Yes.

Q Did either you or Mr. Touro perfect and appeal in this case?

A No, we didn't perfect an appeal. I can give you the reason why.

Q Why didn't you?

A There was an armed robbery case pending against him and as I said earlier—well, we were informed by the District Attorney as well as the Court they were going to try him on it.

Q Did you tell the defendant this?

A Sure, I told him.

Q Did you tell the defendants' parents this?

A Sure, I told them. I said the best thing I could do is not take an appeal or he would get thirty years.

Q Didn't the same of facts exist in the armed robbery case as in the murder case?

[25] A Yes.

Q Wouldn't the same objections lie as to the illegal nature of the confession and the legality of the evidence seized?

A Yes.

Q Then, the appeal in the so-called murder case would have the same basis as in the armed robbery case, would it not?

A Looking at it from today, looking at it as we considered it, that was a man's life. I mean as a lawyer, you have to make decisions and we made the decision that the best thing for Francis, at that time was not to take an appeal and we advised him accordingly and he didn't take it.

Q You advised him of the fact—

A We told him we wouldn't take the appeal and he told his family that he kept hollering for an appeal.

Q He asked for an appeal, specifically?

A He asked for an appeal, he knew he had some rights for an appeal. We advised him against it. There comes a time when a lawyer has to make a decision on the matter such as this and leave it to his client. I told him to get another [26] lawyer.

Q You and Mr. Touro wouldn't have taken an appeal unless ordered by the Court?

A That's right. We were Court-appointed, we done what we felt we could do and that was it.

Q The defendant wanted an appeal and you and Mr. Touro advised him against it?

A Under the circumstances, yes.

Q How old was he at the time, if you recall?

A He was seventeen the day of the trial. He was sixteen when the act was supposed to have occurred.

Q Did you actually speak to the District Attorney and to the Court in reference to this armed robbery charge?

A Well, I mean we discussed—after the conviction by the jury, sure, we discussed it in the chambers.

Q Was the discussion just with the District Attorney? What went on in that discussion?

A All of them was there at one time. I talked to the District Attorney separately, I think we all went in there and discussed it with the Court.

Q Was this prior to sentence?

[27] A Definitely.

Q What was the—just give us the gist of that discussion.

A Well, I think everybody felt that the jury had been lenient on him because of his youth and he got a break that they didn't find him guilty as charged and I am not going to kid, we didn't want to be tied up with the rest of our lives with a Court-appointed case. When we heard the facts throughout the trial and as it appears to us, we would be wasting our time as lawyers.

Q Isn't that a preliminary reason why you didn't take the appeal because you had enough of the case?

A The preliminary reason was we felt that man would get thirty years consecutive after he served his murder time.

Q After he served his murder time or wasn't he going to be sentenced at the time of this discussion to natural life in the penitentiary?

A Yes.

Q What sentence was there to run consecutive with?

A Well, if there wasn't a consecutive sentence [28] in other words, he was going to trial on armed robbery.

Q In other words, he had life? Could he have gotten thirty years above life?

A I don't know, I honestly don't know. You might think I am kidding you. I don't know, we thought so at this time.

Q After you had had this discussion with the District Attorney and the Court, did you advise the defendant exactly what was going to happen to him?

A As well as his parents, I know his mother was there, I am not sure about his father.

Q Did the defendant still persist that he wanted to appeal?

A Well, I think his parents imposed it upon him. He was a minor at the time and they followed our advise. Francis is a man but he was a terrified, young seventeen year old. I think that after a length of time he just sat there.

Q Do you know if the Court informed him upon sentence that he had a right to appeal?

A The Court didn't inform him about anything.

Q Do you know if someone else, other than you and Mr. Touro advised him he had a [29] right to an appeal?

A Nobody else.

Q Did you and Mr. Touro in fact advise the defendant he had a right to appeal in this case?

A After all of that kind of noise being made we told him he had a right to appeal. We didn't say any of those words, you can go up higher. It is best that you take this sentence, the jury saved your life and that's it. All of this about you have a right to appeal, we don't do it, nobody else was doing it that day. He knew he had a

right to appeal if he knew anything. He was young, he knew something but he also knew that we felt we had done the best we could for him. To get a new trial, it would only damage his life again and put him up to the chair again and we didn't want that.

Q Just after the defendant's conviction, did you receive any letters or papers from him indicating that he wanted to appeal?

A I never received any letters or papers from anybody, I don't know what Mr. Touro received.

Q Did you have an occasion to speak to the [30] defendant at the time from the date of sentence until fifteen days after?

A No.

Q You didn't go back to see if he had a change of heart?

A No, there was no reason from my standpoint to go back and I didn't go back. I don't know what Mr. Touro did.

BY MR. WINSBERG:

That is all I have.

CROSS-EXAMINATION

BY MR. STORY:

Q Mr. Amedee, approximately how long was it before the time of trial that you were incorporated with co-counsel, Mr. Touro?

A Two or three months, I am not positive.

Q Two or three months?

A Two or three months, I am saying I am not positive.

Q I am trying to get the time element down here.

A That's the best answer I can give you.

Q Were you aware of the—after talking with your client, were you aware of the different confessions and all, the written confession and the different inculpatory evidence in the hands of [31] the State at that time?

A I was aware of all the so-called confessions but I felt all of them were illegally and unconstitutionally obtained.

Q You felt this as the attorney representing the client?

A As the defense counsel representing the man for his life.

Q Did you take the proper procedure before the Court to strike the confession and all other matters that you felt were unconstitutional?

A We filed a prayer for oyer and Mr. Touro filed a motion to suppress which I believe I signed. We reserved bills of exception during the trial.

Q Were you given a copy of the written confession in this matter?

A It's in the record, I am positive we would get a copy.

Q Had you talked to your client regarding this statement?

A Yes. He also told me about the oral confession in Alabama, so-called oral confession while he was with the FBI, some federal something.

Q I realize you are an attorney, I am asking [32] you to answer only the questions I ask you.

A I want to explain too.

BY MR. WINSBERG:

The witness has a right to explain his answer.

BY THE COURT:

Just ask him a question and I will determine if it requires an explanation.

EXAMINATION BY MR. STORY:

Q Mr. Amedee, how many defendants were there in this matter?

A There was Jerry Anderson, Paul Honore (spelled phonetically) and Francis.

Q How many attorneys all total were involved in this particular case?

A I represented Anderson and I also joined in with Mr. Touro to represent Francis and this man from Duplanche's office represented Honore (spelled phonetically) but there was no trial on Honore (spelled phonetically) and Anderson. The only trial was with Francis which was Touro and Amedee.

Q I see that you submitted a motion to suppress the evidence the date of the trial, is that correct, sir?

[33] A Sure, that's correct.

Q Had you known about the evidence before then?

A What evidence?

Q Well, you submitted the motion to suppress the evidence?

A You're asking the question, all I am saying is this. I don't know when they gave use the confession, it could have been two or three days before the trial. You can't file a motion to suppress the evidence with something you don't have.

Q Did you know its existence?

A You mean of the confession?

Q Yes.

A Well, I mean after all we don't know how much confessing he did.

BY THE COURT:

He asked you if you knew of the existence of any confessions.

BY THE WITNESS:

The only ones I knew of was the so-called written. We didn't know how many other written ones they intended to use.

EXAMINATION BY MR. STORY:

Q You did know of the existence of the written confessions?

[34] A The purported written confession, yes.

Q You had talked to your client on several occasions before this?

A About two or three times.

Q You talked with his parents involved in this case?

A One or two times.

Q Had you and Mr. Touro discussed this on several occasions?

A One or two times.

Q You were both aware of the trial procedure you were going to take in this matter?

A We decided on what trial procedure we were going to take.

Q You were there when the jury was picked, correct?

A Yes, participated in the selection of the jury.

Q You participated in the selection of the jury?

A That's one of the main reasons why I was there.

Q Do you believe that it was a fair and impartial jury?

A Under Witherspoon, no.

Q I am asking you a question—

A I am answering. Under the Witherspoon, no.

[35] Q Did you object at the time?

A I would say yes.

BY THE COURT:

For what reason?

BY THE WITNESS:

Your Honor, you got people being put on the jury who believe in the death penalty and the State is using its challenges which is giving them cause to exclude all of them because they don't believe in it. I am not being given the opportunity to no defense counsel, that I can recall before Witherspoon in this city or state was ever given the opportunity to question the ones that said they didn't believe in capital punishment and as to whether or not they would still follow the state law as the distinction made in Witherspoon. That was not permitted in any of the Courts in this State prior to Witherspoon.

BY THE COURT:

Are you saying you tried to do that and I stopped you from doing it?

BY THE WITNESS:

I am not saying that but I am saying this—

[36] BY THE COURT:

That's what you just told him; that you objected. I don't want you to make guesses.

BY THE WITNESS:

I am not guessing.

BY THE COURT:

You just answered me that you don't know, if you don't know, then say you don't know.

BY THE WITNESS:

Anybody who said they didn't believe in capital punisment, I would say this that on one or two occasions —let me ask them questions and the Court told me no. I would say that in that case and any murder case I have handled. That has been something on my mind all my legal life.

BY THE COURT:

We are going to read the transcript and you better be right because I don't want you making statements about something that happened seven years ago and saying something as a fact. I know you are sitting up here guessing right now.

BY THE WITNESS:

[37] I am saying this—

BY THE COURT:

I know what you are saying.

BY THE WITNESS:

I am an expert criminal lawyer in capital cases. One of the things that bugged me long before Witherspoon was the unfair advantage that the State has on defense counsel that they can get all of the people off of a jury by cause who don't believe in capital punishment and the ones that believe in capital punishment, we have to use our pre-emptory challenges to get it off. As I can recall in my entire criminal life, I was against it and raised sand in all Courts.

BY THE COURT:

You are also positive and one or two occasions you wanted to ask a juror a question and I wouldn't let you? is that what you are saying?

BY THE WITNESS:

As best as I can determine by my past action, I would say yes.

BY THE COURT:

I don't know about your past actions, I want [38] to know what you remember about this case.

BY THE WITNESS:

I have independent recollection and that' it. There is no transcript.

BY THE COURT:

That's what I want to find out.

BY THE WITNESS:

I know the practice in the State of Louisiana.

BY THE COURT:

I am not concerned about the State of Louisiana or any other Court. I am talking about this case.

BY THE WITNESS:

I would say it's the practice in this Court—

BY THE COURT:

I am talking about this case.

BY THE WITNESS:

I can't recall, it's been seven years ago—all based on my past action.

EXAMINATION BY MR. STORY:

Q Mr. Amedee, going back to the time of trial, the jury is selected and you all began the trial. Did you reserve any bills of exception during the trial which is [39] normal?

A Yes.

Q The trial was over and the jury came back with a guilty verdict without capital punishment?

A That's correct.

Q After consulting with your co-counsel, you decided it was best not to appeal the conviction?

A We also talked about it to the DA and Judge.

Q Was this based upon your opinion as an attorney at law and the opinion of your co-counsel as an attorney at law as to the facts you had heard and the factual basis of the guilty verdict?

A No, it was based on this. We knew there was an armed robbery case. So we discussed that. Now, after that we decided it was best that he not appeal. What's that question you asked about facts?

Q I beg your pardon?

A You asked me something about facts?

Q Based on the facts of the trial and what you heard at the time of the trial, did you believe as an attorney at law it was best not to perfect an appeal in this matter?

[40] A If you take into consideration that the confessions were admitted in evidence which we considered illegal.

Q I asked you, yes.

A I don't hear you.

BY MR. WINSBERG:

I am going to ask that the question be qualified in that the witness is answering as to law and the State is questioning as to facts.

BY THE COURT:

The witness heard the question, he ought to be able to answer it.

EXAMINATION BY MR. STORY:

Q Based upon your experience as an attorney at law representing Francis after the hearing the case, the State's evidence and after the jury returned a verdict of guilty, did you believe that it was best not to perfect an appeal in this matter based on what you heard at the trial of this case?

A Not necessarily. Like I said, there was an armed robbery case pending against him. We discussed that with the DA and the Judge and this man was going to be tried for armed robbery. We filed a [41] motion for appeal, pending that appeal, we were going to prepare for an armed robbery case that had its effect on our decision.

Q You were negotiating a plea bargain at that time?

A I don't know what you call it.

Q What would you call it?

A I don't know.

Q I am asking you what you would call it.

A We were doing the best at that time for our client.

Q That's bargaining?

A I don't know, a deal I guess you would call it.

Q Were you dealing in cases realizing what other cases were against the man?

A I would say this. I am still going to put it in my way.

BY THE COURT:

You can answer it eventually and then you put it in your way after you answer it.

BY THE WITNESS:

I don't understand how to answer it unless you want me to say yes.

BY THE COURT:

We don't want you to just say anything, we [42] want you to answer as a lawyer.

EXAMINATION BY MR. STORY:

Q Mr. Amedee, after the jury had returned its verdict, you decided not take an appeal knowing the other case was pending against your client at that time and as an attorney, did you believe this was in the best interest of your client in a plea bargain or arrangement or a deal arrangement situation—were you acting in the best interest of your client as an attorney at law at that time?

A I think I was.

Q Was your co-counsel also believing the same?

A I think he also thought the same thing.

Q Do you still believe you acted in the best interest of your client at that time?

A That was in 1965.

Q At that time?

A At that time, yes.

BY MR. WINSBERG:

I am going to ask—the answer was not responsive to the question, he asked if you still believe that it was in the best interest.

BY THE COURT:

[43] He is a lawyer, he is able to answer, he is not a layman. He has more experience that either one of us.

EXAMINATION BY MR. STORY:

Q Mr. Amedee, I ask you this question. Since the transcript is colorblind, would you please state your race?

A I am black.

Q Mr. Touro?

A Black.

BY MR. WINSBERG:

I object to that as to its relevancy of the question and ask that the prior question be striken.

BY THE COURT:

You don't need to answer it.

BY MR. WINSBERG:

I am going to ask to move that the prior question be stricken from the record.

BY THE COURT:

It's in, what difference does it make one way or the other? What difference does it make? If he is a lawyer, that is all I am interested in.

EXAMINATION BY THE COURT:

Q What happened to the armed robbery after the case and you didn't appeal?

[44] A I never checked the record, but it better have been dismissed.

Q Was that after the arrangement you made with the District Attoreny?

A Yes.

EXAMINATION BY MR. STORY:

Q What's the prescription date on armed robbery in this case, Mr. Amedee?

A Three years.

Q What year was this?

A 1965.

Q This is 1971.
A That's right.
Q So as an attorney, you can safely say that that case is prescribed and no action has been taken on it?
A That's correct.
Q Did you not object to the jury at the time of trial, did you Mr. Amedee?
A I object to the jury?
Q Yes.
A File a motion to quash the venire?
Q Yes.
A We didn't do that.
Q Do you believe the jury at the time of trial was a fair cross-section?

BY MR. WINSBERG:

[45] Objection, he has no way of knowing that.

BY THE COURT:

You won't like the answer he will give you, he is going to tell you what he wants to tell you.

EXAMINATION BY MR. STORY:

Q Mr. Amedee, you informed the defendant and his mother and his family that you would not perfect an appeal in this matter, correct?
A We advised against it.
Q Was he present at the time?
A Well, he was present at the bench when we was talking to him. He wasn't present when we talked to his mother, she was outside.
Q Was he in your presence when you talked about the appeal at one time?
A To him?
Q Yes.
A Yes.

BY THE COURT:

You said the parents accepted this advise not to appeal and so informed him, is that correct?

BY THE WITNESS:

Again, Your Honor, as best as I can recollect, [46] I know the Court and other cases allow you to stand by the bench and talk to him.

BY THE COURT:

You testified before on direct-examination that you told his parents that you advised not to take an appeal and that they took your advise.

BY THE WITNESS:

That's correct.

BY THE COURT:

You told the defendant to follow your advise also?

BY THE WITNESS:

How we communicated to them I am not sure. We told him, his parents was for it and he must have nodded his head. He knew his parents was going along with the program.

BY MR. STORY:

No further questions.

REDIRECT-EXAMINATION

BY MR. WINSBERG:

Q Let's go back to the point, Mr. Amedee where we discussed this Witherspoon decision. Was it your practice as a criminal attorney in handling capital cases that [47] you would, as a matter of course make what is now generally known as the Witherspoon objection?
A Yes, but I called it the Amedee objection. I didn't even know about Witherspoon. I will say that long before Witherspoon this man from up in Pennsylvania, this specialist on this stuff had been explaining this stuff for six or seven years and we knew about him. Before I knew about him I felt it was wrong for the

State to have that advantage on me of all those easy challenges of cause because a lot of people get off the jury saying they didn't believe in capital punishment.

Q You can't recall if you made this objection in this particular case but you may have made it?

A I believe I made it but I can't say positively.

Q The transcript would reflect whether you made this objection or not?

A Naturally.

Q Have you ever seen any transcript in reference to this case?

A I never did ask for one, I never see it.

[48] Q Do you think the transcript would aid you?

BY THE COURT:

I don't care if there isn't a transcript and won't be one unless I order one.

BY MR. WINSBERG:

Would it be helpful?

BY THE COURT:

It would be helpful for everybody. We are not here to write up transcripts in every case.

BY MR. WINSBERG:

Why—

BY THE COURT:

We won't go into it any further.

BY MR. WINSBERG:

There is a—

BY THE COURT:

It isn't a question of what kind of an appeal, it's a question of what is in this writ. We have been through this. If you have anything else to ask him, ask him.

BY MR. WINSBERG:

I am asking him about the transcript.

BY THE COURT:

I won't permit you to, the question speaks for itself.

BY THE WITNESS:

[49] I didn't answer him when I said that before.

BY THE COURT:

I know you didn't ask for one, the question speaks for itself.

BY MR. WINSBERG:

That is all.

BY THE COURT:

Step down, Mr. Amedee.
Proceed.

BY MR. WINSBERG:

Call Max Gonzales.

MAX GONZALES

after having been first duly sworn by the Judge, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. WINSBERG:

Q State your name and occupation.

A Max J. Gonzales, Minute Clerk, Section G.

Q Were you so employed in that capacity on June 24, 1965?

A I was.

Q Were you the Minute Clerk in the case numbered 187-385, State of Louisiana versus Jerry Anderson, Paul Honore (spelled phonetically) and Francis?

A I was.

Q Were you present in Court the day of trial, [50] June 24, 1965?

A Yes, I was.

Q Were you also present in Court, to your recollection on June 23rd, 1965?

A Probably, I would have to check. Yes, I would say, yes.

Q I am going to hand you now the Clerk's record in relation to the aforementioned case and ask you if you took a part in preparing that record?

A Yes, I did.

Q Are all the minute entries contained in that record yours or did some other clerk or stenographer participate in preparing the record?

A Elmo Sanchez was assisting me at this time. He typed it, I read it and signed it.

Q You have endorsed all the minutes?

A Oh, yes, definitely.

Q I am going to recall your attention to the date of trial, June 24, 1965 and ask you whether a motion to suppress the evidence was filed in this case by Mr. Touro and by Mr. Amedee?

A Yes, it was, it's in the record. I stamped it and signed it myself.

Q Was there a ruling by the Judge as to that [51] motion?

A It's written on the motion. It was denied.

Q Was there any hearing—does your minute entry reflect any hearing on that particular motion?

A The minute entries on the back of the bill of information does not reflect it. All it does, it reflects it on the motion itself.

Q Is there in fact a minute entry that reflects that a motion was filed?

A Not on the back of the bill of information, only the motion in the record itself which was marked filed by me.

Q It's in the record?

A It is stamped and filed by myself.

Q The motion is in the record? There is no reflection of the motion being filed in the minutes?

A On the back of the information.

Q Would it be anywhere else?

A Probably be in the minutes.

BY THE COURT:

What point are you trying to make?

BY MR. WINSBERG:

A motion was filed and if this record, on its face went up to any Court there is [52] no entry made that a motion to suppress was filed.

BY THE COURT:

It's in the record.

BY MR. WINSBERG:

There is no entry.

BY THE COURT:

What does it prove?

BY MR. WINSBERG:

It's part of the record.

BY THE COURT:

How is he prejudiced if it is in the record and marked filed by the Minute Clerk?

BY MR. WINSBERG:

If it goes up, we have no knowledge.

BY THE COURT:

You could find it by looking at the file, it's marked and ruled on by me. There wasn't a hearing because I didn't have an evidentiary hearing.

EXAMINATION BY MR. WINSBERG:

Q What about other motions filed in this case, the motion for a bill of particulars, prayer for oyer and motion to quash, are they reflected in your minute entries?

A Not on the back of the bill of information it isn't.

[53] Q Anywhere?

A I don't know if it's in the record. In the record, there is an application for bill of particulars, a motion to quash that was filed and signed. It isn't on the back of the bill of information, it's in the record, filed and signed by myself on June 23rd, 1965.

Q Does your record reflect any written answer being filed by the State?

A No, there is no written answer in the record.

Q Can you recall if there was any type of hearing held in reference to those three motions, the motion to quash, the prayer for oyer and bill of particulars?

BY THE COURT:

I don't see the relevancy of it. There is nothing in the writ about prayer for oyer or anything. The only thing it pertains to is his right to appeal, the transcript, discrimination of jurors in selection of the Grand Jury.

BY MR. WINSBERG:

It certainly has something to do with the motion to quash as to what was contained in there.

[54] BY THE COURT:

What does it have to do with the writ?

BY MR. WINSBERG:

First of all, the availability of a transcript. No transcript has been made.

BY THE COURT:

There isn't going to be one either. This writ will adhere.

BY MR. WINSBERG:

That's a question for a transcript.

BY THE COURT:

To take an appeal which has long prescribed.

BY MR. WINSBERG:

Can you give me an answer to that question?

BY THE COURT:

They are not in the record. Anything else you want to know about the record.

BY MR. WINSBERG:

They are not in the record?

BY THE COURT:

There is no answer. There is only my notation that the State answers were good and sufficient in law.

EXAMINATION BY MR. WINSBERG:

Q Do you have any independent recollection of this case?

A No, I really don't.

[55] BY MR. WINSBERG:

That is all I have.

BY MR. STORY:

No further questions.

BY THE COURT:

Step down.

BY MR. WINSBERG:

Call the defendant to the stand.

ABRAHAM FRANCIS

after having been first duly sworn by the Minute Clerk, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. WINSBERG:

Q State your full name.
A Abraham Francis.
Q Where are you presently confined?
A C-4 in the Parish Prison.

Q Where were you before you came to the Parish Prison?

A At Angola.

Q You were sentenced to life imprisonment as a result of being found guilty without capital punishment in the case entitled State of Louisiana versus Abraham Francis, et al?

A That's correct.

Q You are the same Abraham Francis that has [56] filed a writ of habeas corpus and is being heard today?

A That's correct.

Q How old were you at the time of your alleged offense in November 4th, 1964?

A Sixteen.

Q How old were you on the date of your trial, June 24, 1965?

A Seventeen.

Q Do you recall approximately when Mr. Touro and Mr. Amedee were appointed to represent you in reference to your charges?

A I don't recall.

Q Can you estimate approximately how long before your trial date they became involved in the case?

A No, I really don't. I couldn't even give you a rough estimate. It was approximately—maybe two months.

Q Did Mr. Touro and Mr. Amedee come to see you?

A I recall Mr. Touro seeing me.

Q Where did he see you?

A In the Parish Prison.

Q Did you ever see Mr. Amedee in the Parish Prison?

A Well, Mr. Amedee was there, as I recall he [57] talked to Jerry Anderson.

Q He talked to Jerry Anderson?

A (Nods head in an affirmative matter.)

Q Did you ever speak to Mr. Touro in reference to a confession you made?

A He asked me did I make a confession and I told him yes.

Q Did you tell him the facts and circumstances surrounding that confession?

A I did.

Q Did you also tell Mr. Amedee about that confession?

A We talked about it also.

Q Approximately how long before your trial did that take place?

A I don't recall.

Q Was it more than a week if you can recall? I realize it has been six years ago.

A I really couldn't say.

Q I assume that you were present at your trial?

A I was.

Q From the beginning until the end?

A Until the end.

Q You were represented at your trial by Mr. Touro and Mr. Amedee?

A I was.

Q You went to trial by yourself?

[58] A By myself.

Q The other two defendants had plead guilty?

A Correct.

Q Just prior to the trial, do you recall motions being filed by your lawyers? If you don't know, just say you don't know.

A Really, I don't know. At the time there was not much I knew about a motion to be filed.

Q Did you ever volunteer to plead guilty in this case?

A Not really, not that I recall.

Q At the time of your trial, you were found guilty without capital punishment?

A I was.

Q Were you informed by anyone that you had a right to appeal?

A Not informed by anyone that I had a right to appeal by law, I wasn't.

Q After you were convicted, did you discuss the possibility of an appeal, what you could do?

A I knew what an appeal meant and I talked to Mr. Amedee about it.

BY THE COURT:

What did you say?

[59] BY THE WITNESS:

I said I knew what an appeal meant but I talked about it with Mr. Amedee, about it as he said there was no sense.

EXAMINATION BY MR. WINSBERG:

Q Mr. Amedee said there was no sense?
A Yes.
Q Why did he say that, do you know?
A He never explained it to me, just what he really meant but this is the term he used, there was no sense.
Q Did you want to appeal?
A I did.
Q Why did you want to appeal at that time?
A Because I just felt I wasn't given any justice.
Q In what respects? Can you say in what specific respects?
A Well, the person can feel when he feels he has been given a fair trial. I felt I wasn't given a fair chance.
Q Did you express your desire to Mr. Amedee and to Mr. Touro that you wanted to appeal?
A I told him.
Q Did you tell your parents that?
A Yes.
Q What were you told, first of all by Mr. [60] Amedee? What did he tell you?
A Just as I said before, he said there was no sense.
Q Was any mention made to you about the armed robbery charge that was still pending?
A I don't recall anything mentioned to me about an armed robbery.

Q If you can recall, now, what else did Mr. Amedee say about an appeal other than there was no sense to it?
A That was all, this is how he summed it up, this was his answer.
Q Were you informed, to your recollection by Mr. Touro in reference to your appeal?
A I don't recall because on the date of sentencing Mr. Touro wasn't even present.
Q Did you have an opportunity to speak to your parents prior to your sentence?
A I spoke with them.
Q What did they tell you?
A They told me the same thing, it seems as though he was convinced—they convinced them it wouldn't make any sense. I would have to stay back there two years and I would lose that also. They figured it was best for me to stay [61] up there for awhile and try to get a time cut.
Q Do you realize you were sentenced by the Court to spend the rest of your natural life in the penitentiary?
A Yes.
Q What did that mean to you?
A I was hoping at my age—it seemed I didn't have any help. It seems though the whole world had turned against me.
Q When it was actually your time for sentence, did the Judge inform you that you had a right to an appeal?
A No, he didn't.
Q Just prior to your being sentenced, did you know what you were going to receive before you were sentenced?
A I didn't know exactly what I was going to receive. If I recall, I believe one of the fellows had been found guilty of capital punishment and he received life.
Q Knowing that you were going to receive life and then in fact having received the sentence from the Court, did you do anything just after your sentence to perfect an appeal or begin the process of an appeal?
[62] A Not until I got to Angola.

Q How long after your sentence were you transferred to Angola?
A On August 3rd, 1965 I was transferred to Angola.
Q Say between June 24 when you were found guilty and after you went to Angola, did you do anything?
A No, I didn't.
Q Did you know you had rights and could have done something at that time?
A At that time, I didn't.
Q Did you want to do something?
A I would have liked to have did something.
Q What's your desire here today? What do you want in coming before the Court?
A I would like to get an appeal.
Q You always wanted a transcript?
A I would like to have a transcript to perfect the bills of exception on my appeal.
Q Why do you want a transcript?
A Like I said, in order for the appeal. I have to have grounds for the appeal and this is the only place I can get them is out of the transcript.
Q When did you first apply for a transcript?
A Around October 1970.
[63] Q Did you do anything at all in reference to your case between '65 and 1970?
A Not with the Courts.
Q What did you do extra?

BY THE COURT:

I am not interested in what he did outside the Court, all I am concerned with is the communication with him and this Court.

EXAMINATION BY MR. WINSBERG:

Q Did you write to the Court?
A In October of 1970 there was a motion filed to the Court, a pre-trial document.
Q Just prior to that, did you appeal to any other Courts, Federal Courts or State Supreme Courts or any other Courts?
A No, I didn't.

Q At the time of your trial and after your trial, were you a pauper?
A I was.
Q You had no funds to hire another attorney?
A I didn't.
Q You are a negro, is that correct?
A That's correct.

BY THE COURT:

Why is this relevant that he is one and his lawyer is not?

[64] BY MR. WINSBERG:

My next question will take it up.

EXAMINATION BY MR. WINSBERG:

Q Were you informed either by your Counsel or by anyone that your attorneys had not attacked the make-up of the Grand Jury or Petit Jury on the basis of systematic exclusion of negroes?
A No, I wasn't.
Q Did you know anything about that at that time?
A At that time, no.

BY MR. WINSBERG:

That is all I have.

BY MR. STORY:

No questions.

BY THE COURT:

You can step down next to your Counsel.

BY MR. WINSBERG:

I would like to call Mr. Gonzales back to the stand.

MAX GONZALES

having been previously sworn by the Judge, was examined and testified further as follows:

BY THE COURT:

Read the minute entry for that case on that date.

[65] BY THE WITNESS:

On June 23rd, 1965, this is trial. A motion for severance as to Jerry Anderson and Paul Honore (spelled phonetically) was granted by the Court. The defendant Jerry Anderson withdrew his former plea of not guilty and entered a plea of guilty to RS:14-31 (Manslaughter). The plea was acceptable to the State. The Court ordered the plea recorded after the defendant waived all legal delays through his attorney Earl Amedee, he was then sentenced by the Court to serve eight years in the Louisiana State Penitentiary to run concurrently with the sentence imposed in Section H. The defendant Paul Honore (spelled phonetically) through his attorney Adrian Duplantier, Esq., withdrew his former plea of not guilty and entered a plea of guilty to RS:14-31 (Manslaughter). The Court ordered the plea recorded and after the defendant waived all legal delays, he was then sentenced by the Court to serve eight years in the Louisiana State Penitentiary. Anderson [66] gave his age as twenty-one years old, born January 27, 1944 in the State of Louisiana. Honore (spelled phonetically) gave his age as twenty-two years old, born July 30, 1942 in the State of Louisiana. The State then proceeded to go to trial with Abraham Francis. Prosecutors for the State, Alvin V. Ozer and John Voltz, Assistant District Attorneys, informed the Court that they were ready for trial. The Defendant Francis was then placed at the Bar of the Court accompanied by his Counsel, A. P. Touro, Esq., and Earl Amedee, Esq. Mr. Touro then presented to the Court a motion for a continuance as to the trial. Motion was denied and Mr. Touro reserved a bill of exceptions. Mr. Touro also reserved a bill of exception when the Court informed Counsel that witnesses did not have to leave the Courtroom until a jury is picked. Mr. Amedee and Mr. Touro reserved three bills of exception as to statements made by Mr. Ozer to the prospective jurors. Mr. Amedee then filed with the Court

a Bill of Particulars, Motion to Quash, and [67] Prayer for Oyer. The defense then informed the Court that they were satisfied with the State's answers to the Bill of Particulars. Motion to Quash was denied by the Court and Mr. Amedee reserved a bill of exception. Defense then informed the Court that they were satisfied with the State's answer in paragraph one in the Prayer for Oyer. The Court rules that the State's answers to paragraph two and three were good and sufficient in law, to which Mr. Amedee reserved two bills of exceptions. Mr. Amedee also reserved a bill of exceptions as to a jury being excused for cause and went on with the trial.

Q What date is that?

A 24th.

Q Where are you reading from?

A Reading from the minutes of Wednesday, June 23rd, 1965, the trial lasted two days.

Q Is there any reflection in there as a motion to suppress being filed or not being filed either on the 23rd or 24th?

A No, nothing on that. No, they don't have that [68] on there.

Q Is there any reflection of that in there?

A No.

Q There is no reflection of any bill of exception being made by Touro or Amedee when the Court refused to allow the motion to suppress to be filed?

A Nothing.

Q Is it the custom of the Clerk to—the Minute Clerk to put in there bills of exception that are taken during the vodire?

A Every bill taken is in the minutes.

Q There is a reflection that there was an exception made by Mr. Amedee when a juror was excused for cause?

A Right.

BY MR. WINSBERG:

That is all.

BY THE COURT:

Step down.

Proceedings held on Tuesday, the 29th day of June 1971:

BY MR. WINSBERG:

At this time the defense would call Mr. John Volz to the stand.

MR. JOHN VOLZ

[69] after having been first duly sworn by the Minute Clerk, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. WINSBERG:

Q State your name and address and occupation, please.

A John Volz, I live at 1002 Broadway, Chief Assistant District Attorney, Parish of Orleans.

Q Were you so employed as Assistant District Attorney for the Parish of Orleans on June 23rd and 24th of 1965?

A Yes.

Q Were you assigned to be one of the prosecutors for the State of Louisiana versus Abraham Francis et al, number 187-385?

A I don't know if that's the docket number and I have no independent recollection of the defendants named but if that's what the Court records reflect, that I tried it, I did.

Q Do you have any independent recollection of this case whatsoever as to the facts?

A Well, after discussion with some people in the office, Mr. Story.

Q And with myself?

A And with you. You pointed out some of the [70] facts and I do recall the case because the facts were somewhat unusual because we proceeded under the felony murder doctrine wherein an accomplice was

killed and not the victim which changed it somewhat from the regular felony type murder. I remember the case and I remember trying it.

Q You assisted the prosecution in the case, is that not correct?

A Well, Judge Oser who was then the Assistant District Attorney and I tried the case. I believe at that time Judge Oser was in charge of capital cases and I was assigned to Section G so we tried it together.

Q You actually did participate in the trial of the case?

A Oh, yes.

Q Now, this was a murder case, Mr. Volz and information has been brought to my attention there was also existing at that time against Francis an armed robbery charge, were you aware of that?

A Yes, I believe that's correct.

Q Now, of course you understand you are here today, being called as a witness for [71] the defendant on a writ of habeas corpus that had been filed by Francis?

A Yes.

Q There has been some testimony that there was a discussion that took place in Judge Shea's office in reference to Abraham Francis' appeal after he was found guilty without capital punishment. Do you know anything of a discussion of that nature?

A No, it would be very difficult for me to go back six years and pick out any particular discussion because at that time I was assigned to Section G and had many, many discussions in the Judge's office with the Judge and defense counsel about many cases so for me to go back and say with any degree of certainty that—I am sure we must have had discussions about the case, we had discussions about all cases but what was said, I can't remember.

Q You have no independent recollection of any prebargaining or any deal being made whereby the defendant considering not appealing, a certain armed robbery charge would be dismissed by the District [72] Attorney's office?

A No, I have no independent recollection of that.

Q Would your file, your District Attorney's file reflect any such discussion and negotiations?

A It might.

Q Would you peruse it and see if any discussion of that type might have taken place?

A Sure.

Q I am also going to hand you the Clerk's file which may or may not help you.

May I interject this while you are looking at the file? Would the case number of the alleged armed robbery charge help you in any way as to how the case was disposed of?

A It might, it's possible that some notation was made on the armed robbery file, as to why it was dismissed.

Q Does that file reflect the number of the armed robbery charge? That's the District Attorney's file?

A We, at one time had a cross-reference system but it would be a closed number, I am sure.

[73] Q Have you had an opportunity to review your file?

A I have looked at our file and I see nothing to indicate any discussion after verdict which that would necessarily have had to be.

Q It would have been after the verdict, it would have been in fact after June 24th, or June 25th.

A Our last entry which I made was on the 29th of June, 1965. I indicate life in prison and his age seventeen and the note for the record division to close the file. That's the last entry on here is the 29th of June.

Q Is there any mention whatsover in that file as to any appeal?

A None, none at all.

Q Would you look at the Clerk's file just for the purpose of completeness? Look at the Clerk's file and see if there is any reflection that would refresh your memory at all. I don't know whether there is anything in there that would refresh your memory or not.

A No, I see nothing other than the last—the verdict on the 24th and the sentence on [74] the 29th. I don't see anything in here that would reflect anything else.

Q You have handled a number of capital cases, have you not?

A Yes, sir.

Q You have also handled a number of armed robbery cases?

A Yes.

Q To your knowledge, have you ever heard of a sentence being made to run consecutive with a life sentence in this building, I am talking about the Criminal District Court for the Parish of Orleans?

A Consecutive to a life sentence? I know we have talked about it and I have heard different opinions, some say you can do it, some say you can't do it. I don't know of any case where it has been done. There may be some I don't know of. I know there are times when we would like to have seen a consecutive sentence to life but my appreciation is that the general concensus is that you can't do it.

Q I ask you to think back when you were in Section G as the trial assistant and Judge Shea was your Judge, did you have [75] or did the District Attorney have any control of the sentence that Judge Shea would give to an individual after being found guilty of any offense?

BY MR. STORY:

I have to object to that.

BY MR. VOLZ:

I will answer that.

A No, we have no control of what Judge Shea did.

EXAMINATION BY MR. WINSBERG:

Q In other words, if a man and I will give you this hypothet, if a man would be found guilty without capital punishment in a case and there would be an armed robbery pending against him, it apparently was a good case you had against him, would you have any way of

knowing prior to conviction on that armed robbery charge as to what that individual would get?

A Well, that would depend on any discussion with the Judge prior to that time that he may have talked about a plea. I don't know if this was done in this case. This is general.

Q This is a hypothet, not this specific case.

A If defense counsel and State have discussions [76] with the Judge, the Judge might indicate what he would give on a guilty plea. I frankly have never heard Judge Shea tell anybody what they were going to get if they went to trial and were found guilty. I have never heard him discuss that.

Q That's an open matter and it's left to the discretion of the Court?

A Yes, we would—the only time that we might possibly have any recommendation as to sentence would be if we were going to reduce a charge for a plea and our reduction might be based on possibly a certain number of years that we might recommend and of course, it's still up to the Judge to give it or not give it and it's up to us to reduce or not to reduce. This takes place in the plea bargain. As far as the Judge committing himself on a sentence after trial, I have never heard it from any Judge.

Q What about appeal bargaining, have you ever participated in any appeal bargaining? In other words, where a man in consideration of another charge being dismissed would perhaps waive his rights to an [77] appeal?

A I can say emphatically no within the last three or four years. Prior to that time I may have had discussions about appeals. I may have, I can't recall any specific instances. I know I haven't in the last three or four years.

Q Let's go back to this specific case. You have no independent recollection of any discussion for lack of a better phrase of any appeal bargining that took place in this particular case?

A No, none at all.

Q Mr. Volz, I would like you and it's not in the form of a question to ask you if you would review the armed robbery charge, the District Attorney's file the armed robbery and see if that would reflect anything.

BY MR. STORY:

I don't have the file right now.

BY THE COURT:

The armed robbery was nul-prosed the same day as the sentence, June 29th. That's what the minutes show.

BY MR. WINSBERG:

No further questions at this time.

[78] BY MR. STORY:

No questions.

BY THE COURT:

All right Mr. Volz, you can step down.
Proceedings held on June 30th, 1971.

BY MR. WINSBERG:

At this time the defense would like to call Judge Oser to the stand.

JUDGE ALVIN V. OSER

after having been first duly sworn by the Minute Clerk, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. WINSBERG:

Q State your name and address and occupation.

A Alvin Oser, 644 General Haig, New Orleans, Louisiana, occupation Judge, Criminal District Court, Section J.

Q In June of 1965, were you employed by the District Attorney's office for the Parish of Orleans?

A I was.

Q What were your duties at that time?

A June of '65? I was the prosecutor, Mr. Winsberg, the best I can tell you during that particular time. I was handling a number of particular assignments in the District Attorney's [79] office. Where I was assigned to, what particular section of Court, I don't think I was. I was handling—trying capital offenses, coordinating matters in the District Attorney's office with the detective bureau, homicide division and at that time I handled narcotics and vice for some period of time so I can't specifically say my particular job was in the District Attorney's office at that time.

Q One of your duties was handling the capital cases for the office?

A Yes, sir.

Q I am going to refer your attention to case number 187-385 entitled State Of Louisiana versus Abraham Francis et al and ask you if you have any independent recollection of the facts of that case?

A By the name and case number?

Q Yes.

A No.

Q If I would refresh your memory by stating some of the facts, do you think that would help you?

A Possibly.

Q This was a murder case where the State [80] proceeded under the felony murder doctrine in this case and an alleged victim in this case had her nose shot off and the alleged perpetrator in the case was the deceased. Does that refresh your memory?

A May I see the record a minute? I can remember the particular case with the names, I believe the defendant Jerry Anderson went to trial.

BY THE COURT:

Francis went to trial. Anderson and Honore (spelled phonetically) pled and this defendant went to trial.

BY THE WITNESS:

I don't recall the particular defendant by face, I do recall the particular case because this was the only time

—the reason I recall this particular case, I happened to be in the homicide office on the date of this offense when the call came over homicide and I went with the homicide detectives to the case. It happened off of North Broad Street in a small grocery store with the entrance on the corner. There was a colored male down the sidewalk dead, a woman had been [81] shot in the place, once in the nose and once through the mouth if I remember correctly during the robbery. The thing that made this case different from the normal case was the fact that the deceased on the sidewalk was one of the alleged perpetrators. After the handling of this particular matter it was decided by the District Attorney's office to prosecute the co-defendants or co-perpetrators of the robbery under the felony murder doctrine for the death of one of their perpetrators. This is the only time I recall this being done not only of my years out here but of my knowledge in Orleans Parish. I remember the facts of this case because we were prosecuting—

Q You were one of the prosecutors in this case?

A Yes.

Q You, along with John Volz who was assigned to Section G, is that correct?

A If the record reflects Mr. Volz was in the case, I don't really recall.

Q Were you also aware, Judge Oser that there was an armed robbery charge that was [82] pending against Abraham Francis?

A I don't specifically recall.

Q There was a pending armed robbery charge against the defendant which existed up until or just shortly thereafter the time that the defendant was sentenced upon his conviction for a murder charge. There has been other testimony in this case that there was discussion that took place between you, John Volz, Earl Amedee, A. P. Touro in the office of Judge Frank Shea prior to sentence of the defendant, Francis on the murder charge. Do you recall any such discussions?

A About what? Let me say this. There was a lot of discussions about this particular case because this was the first time we were proceeding under this theory.

Q I am talking about after the defendant was found guilty without capital punishment.

A The only conversation that—this is the only time of my prosecuting a capital case where the defense cut off my water because they waived the closing argument. Mr. Volz was the only one that made a closing argument. There is a lot of [83] talk about it.

Q Neither Mr. Touro or Mr. Amedee argued?

A They waived closing argument and I could not rebut.

Q Let's get back to the discussion. Do you recall any discussion at any time after conviction where for lack of a better term there was some bargaining between the State and defense that if the defendant waived his right to appeal the armed robbery charge pending against him would be nul prossed?

A I can't recall anything about that.

Q You have no independent recollection of any of—of any appeal bargaining being done in this particular case?

A Not in the case—the case is one that sort of stands out in my mind because I was on the scene of the killing and robbery and this is the only time a lawyer stood up and cut off my closing argument.

Q You participated in the trial of many, many capital cases, have you not?

A Over fifty.

Q In your experience in this building, not only Section G of Criminal District Court but of the other Sections that [84] were existing at that time, do you ever recall participating in again for lack of a better term appeal bargaining where someone would give up their right to appeal in a case in return for something from the District Attorney's office?

A After conviction of a capital offense where whether manslaughter—

Q Any type.

A No, Mr. Winsberg, I don't for this reason. I could have really cared less whether the defendant took an appeal because my job was to prosecute. After it was over,

the case was closed out. If they wanted to take an appeal, this was up to them. I didn't care.

Q You had no concern what happened with the armed robbery case?

A Did I have a concern with it? I had to have a concern in considering the prosecution of my overall murder case.

Q After you had obtained the conviction on the murder case, you had no concern with what happened in the armed robbery case?

A No, because then the armed robbery case, the [85] prosecution of it or the dismissal or the disposition of it would then revert back to the trial assistant because I only prosecuted the capital cases. Once that was over with, what happened to the robbery or burglary or whatever the man may be charged with other than a capital offense reverted back to the trial assistant and whoever the supervisor was in those days and I don't think in '65, we didn't have an armed robbery supervisor.

Q Can you recall from your experience where a man, after being convicted of murder and being found guilty without capital punishment, if he was tried for a lessor offense after the conviction such as armed robbery?

A I have no independent recollection of it, it doesn't mean it didn't happen. Like I say, as the capital prosecutor I thought about it a lot of time but if it actually happened, I don't recall. I can't answer your question.

Q What is your appreciation of the law now and if you can remember what your appreciation of the law was in 1965 as to whether [86] someone could receive a consecutive sentence from the life sentence?

BY THE COURT:

I won't permit that question, it's up to me to decide this writ, not Judge Oser. He is a witness.

BY MR. WINSBERG:

I think it has bearing as to what was done with the armed robbery charge.

BY THE COURT:

I don't think that I am interested in what his opinion is on a question of law. I am interested on what he knows about this case. I will decide the questions of law.

EXAMINATION BY MR. WINSBERG:

Q In your experience, Judge Oser, in handling capital cases, could you give an estimate or approximation as to how many defendants or what percentage of defendants appeal from a guilty without verdict?

A I have no way of knowing, Mr. Winsberg, because in handling the capital cases I had absolutely nothing to do with the appeals of any conviction of any type whether they were a manslaughter verdict [87] or guilty without verdict or guilty as charged verdict. That was handled by Mrs. Louise Korns in the District Attorney's office. I didn't have time to prosecute, handle the appeals, I had no idea of what percent or number were appealed. I had no way of knowing. I just didn't follow that in the office.

Q Was the policy in the office at that time, the District Attorney's office to discourage appeals?

A Discourage appeals, no, not to my knowledge. No, like I said, I never discouraged appeals. I could care less if a man took an appeal or not. It wasn't my job.

BY MR. WINSBERG:

That is all.

BY MR. STORY:

No questions.

[88] *CERTIFICATE*

I, Joe M. Riddle, Official Court Reporter in and for the Parish of Orleans, State of Louisiana, hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter before the HONORABLE FRANK J. SHEA, Judge, Criminal District Court, Section G, Parish of Orleans, State of Louisiana, on Monday, Tuesday and Wednesday, the 28th, 29th and 30th day of June, 1971 respectively.

JOE M. RIDDLE
OFFICIAL COURT
REPORTER SECTION G
CRIMINAL DISTRICT
COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

JUDGMENT

(Number and Title Omitted)

The writ filed herein is based on three contentions. Number one, that the defendant was deprived of his right to an appeal. Number two, that he was denied a transcript with which to perfect his bills of exception and to effectively appeal his case. Number three, there was discrimination against negroes in the grand jury which indicted him.

This defendant contends that he was deprived of his right to an appeal. He was tried on June 24, 1965 for the crime of murder and found guilty without capital punishment. On June 29, 1965 he was sentenced to life imprisonment and was represented by both counsel, Mr. A. P. Touro and Mr. Earl Amadee at the time of the sentence. In September, 1970, the defendant requested of this Court a transcript of his case and on October 21, 1970 this Court issued a judgment stating that since no appeal was taken on behalf of the defendant and since the petitioner or defendant alleged no specific errors of law allegedly committed by the Court, the defendant was denied the transcript. On June 10, 1971 the defendant filed the present writ. The transcript of the sentence shows that the defendant was questioned by the Court and stated that he did not wish to take an appeal. At the same time, this fact was reiterated by one of his attorneys, Mr. Earl Amadee. Therefore, the time has elapsed for taking an appeal under the Louisiana law. The defendant's attorney, Mr. Amadee testified on the writ that he told the defendant and his family of his right to take an appeal. The defendant admits talking to Mr. Amadee and his parents about taking an appeal and says that his parents agreed with Mr. Amadee about not taking an appeal. He testified that he was not told by anyone that he had a right to take an appeal

and he also states that he told Mr. Amadee and his parents that he wanted to appeal. Yet, when he was sentenced in open Court he stated that he did not want to take an appeal; and, this Court received no request from him or in the record relative to an appeal until September of 1970, some five years after his sentence. The defendant himself testified that the first time he wrote to the Court about his case and his appeal was in 1970. This Court finds the credible testimony to be that the defendant knew he had a right to an appeal and discussed the same with his attorney and parents who advised against him taking an appeal. The transcript shows that he agreed with their advice and stated in open court that he did not want to take an appeal. Yet, now, five years later he has second thoughts and does want to appeal his conviction.

Since the time for taking an appeal has long prescribed, the defendant is not entitled to a transcript. To do so would be to circumvent the law by requiring the furnishing of a transcript of a trial on a writ when the time for taking an appeal has expired. If such would be the case, in every case, the defendant could get the transcript on a writ though he would not be entitled to one because no appeal was available. Therefore, there would be no finality of the verdict of the jury or the sentence. Here, the defendant was given an evidentiary hearing on the writ on these points and given an opportunity to make a record on the complaints contained in his writ.

With respect to the question of discrimination against negroes in the selection of the grand jury, Mr. Amadee testified that he was aware of the right to attack the grand jury (he was also aware that there were blacks on the grand jury) but did not file such a motion. Mr. Amadee testified that he had defended numerous capital cases and has been practicing law for tweny years. It should be noted also that Mr. Touro had been practicing law for many years longer than Mr. Amadee. Accordingly, the time for an attack on the grand jury which indicted has long passed since the indictment was returned on December 10, 1964 and this attack is filed

in June of 1971. Therefore, the right to attack the grand jury which indicted him has prescribed. (Remember also, this was a felony murder doctrine case and the defendant was indicted for having murdered one of his co-perpetrators of the armed robbery during which the killing occurred) The Court finds that the defendant was represented by two counsel of many years of experience (Mr. A. P. Touro was seriously ill at the time of this hearing and was unable to testify.) However, I am sure the Appellate Courts of this State and higher appellate courts are aware of his standing in the community as an attorney. Both Mr. Touro and Mr. Amadee filed several motions on behalf of the defendant but obviously felt content not to file a motion to quash the grand jury venire in this case. The defendant was ably represented during the trial and counsel were able to secure a verdict of guilty without capital punishment. This alone speaks highly of the representation the defendant received. Therefore, it is the finding of this Court that the defendant was represented by competent counsel; that he knew of his right to appeal but chose, upon advice of his attorneys and parents not to do so, as corroborated by his statement in open court at the time of his sentence; that the attack on the grand jury venire was considered by his attorneys who chose not to make such an attack; and, is now prescribed.

Accordingly, the writ of habeas corpus is denied.

Respectfully submitted,

New Orleans, Louisiana, December 20, 1971.

/s/ Frank J. Shea
Frank J. Shea, Judge
Section "G"

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

No. 52,127

February 8, 1972

STATE OF LOUISIANA EX REL ABRAHAM FRANCIS

versus

C. MURRAY HENDERSON,
Warden, Louisiana State Penitentiary

In re: Abraham Francis applying for writs of certiorari and habeas corpus

Application denied.

The showing made reveals that applicant is not entitled to the relief sought.

/s/ EHMcC
/s/ WBH
/s/ JWS
/s/ FWS
/s/ AT Jr.
/s/ JAD

A TRUE COPY

Clerk's Office
Supreme Court of Louisiana
New Orleans, Louisiana
February 8, 1972

/s/ [ILLEGIBLE]
Deputy Clerk

[Filed: 2/10/72]
S. Sanchez. M. Clk.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA

MAGISTRATE'S REPORT AND
RECOMMENDATIONS (No. 71-1164 "B")

(Title Omitted)

Filed: June 21, 1973

An evidentiary hearing was held on February 20, 1973. The issues being identical, the evidentiary hearings in this matter and the matter of United States, ex rel Bruce Barksdale versus C. Murray Henderson, Warden, Louisiana State Penitentiary, Civil Action No. 71-2411, Section A, were consolidated.

PRESENT:

RUSSELL J. SCHONEKAS, Esq., for Honorable Jim Garrison, District Attorney, Parish of Orleans, and
LEROY A. HARTLEY, Esq., and C. THOMAS PORTEOUS, JR., Esq., for Honorable William Guste, Attorney General for the State of Louisiana, representing respondent, C. Murray Henderson;
BENJAMIN C. SMITH, Esq., representing petitioner, John Newman.
JOHN WILSON REED, Esq., representing petitioner, Bruce Barksdale.

The Court, having reviewed the qualifications of Dr. Arnold Levine, established that Dr. Levine was an expert in the field of Mathematics and Statistics.

Dr. Levine testified, inter alia:

1) That in Orleans Parish in 1962 there were 33.7% non-white who were eligible to serve on the Orleans Parish Grand Jury.

2) That eliminating professionals, 31.9% of the population in Orleans Parish consisted of Negro males between the ages of 21 and 64 with more than five years education.

3) Of the 1,200 persons called for jury duty in January, 1962, 1,002 were White, 138 were Negro and the race of the remaining 60 was undetermined. The percentage of Negroes called for jury duty in January, 1962, was 11.5%. (Adjusting for those who were called for jury duty whose race was undetermined, the percentage of Negroes who were called for jury duty was 13%)

4) That of the 108 persons selected to serve on the 9 grand juries in Orleans Parish from 1958 to 1962, 17 were black.

5) The odds were one in one thousand that of the 17 black jurors that served on the 9 grand juries from 1958 to 1962, they would serve in a sequence of 2-2-2-2-2-1-2-2-2.

Mr. Julian Murphy, the Administrative Assistant to the Jury Commission for Orleans Parish, testified, inter alia:

1) People were selected for jury duty from the City Directory, the Registration Office and from lists they may have gotten from other sources.

2) The Jury Commissioners did not issue subpoenaes for jury duty to persons who were not paid because the Judges did not want them.

3) People who worked in certain firms that did not pay them, welders, electricians, and so forth, were not sent notices because somehow the Judges would have to release them.

4) On August 15, 1966, the Fifth Circuit Court of Appeals came out with a decision and subsequent to the decision, the Judges of the Orleans Parish Criminal District Court sent an order to the Jury Commissioners to send for everybody. The order stated that the only people who were to be released from jury duty were those who were exempt, disqualified or disabled.

5) In 1962, the policy in regard to how the names were picked from the City Directory was generally the same way names were picked in 1950, 1951 and 1952. From 1943 until August 15, 1966, it was the policy of the Orleans Parish Jury Commission not to send jury subpoenaes to people who were known to be hourly rated and were known not to get paid.

FINDINGS OF FACT

1) In January, 1962, in Orleans Parish, Negroes made up 31.9% of the male population between the ages of 21 and 64 with at least five years of education.

2) That of the 1,200 persons called for jury duty in January, 1962, 13% were Negro.

3) Petitioner made a prima facie case of systematic exclusion of Negroes from jury service in Orleans Parish by showing that in January, 1962, of the 31.9% of Negroes eligible for jury service, 13% were called.

4) The State of Louisiana failed to come forward with rebuttal evidence and a constitutionally acceptable explanation for the facts that gave rise to the inference of deliberate and intentional discrimination after the burden shifted to the State on the petitioner's making a prima facie case of systematic exclusion of Negroes from jury service.

5) Petitioner was denied equal protection as provided by the Fourteenth Amendment to the Constitution as Negroes were systematically excluded from the Grand Jury that returned the indictment against him.

6) In 1962, the year that petitioner was indicted, the Orleans Parish Jury Commission was continuing the practice established in 1943 of not sending jury subpoenaes to people who were known to be hourly rated and who were not known to get paid while serving on jury duty.

7) Wage earners were intentionally and systematically excluded from the Grand Jury that indicted petitioner in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution.

8) The Grand Jury that indicted petitioner was not drawn from a cross-section of the community.

CONCLUSIONS OF LAW

It is well settled that under the Equal Protection Clause of the Fourteenth Amendment a state court conviction cannot stand if it is based on an indictment of a grand jury or a verdict of a petit jury from which

black persons were excluded because of their race. *Strouder* v. *West Virginia*, 100 U.S. 303 (1880); *Pierre* v. *State of Louisiana*, 306 U.S. 354 (1939); *Smith* v. *State of Texas*, 311 U.S. 128 (1940); *Patton* v. *State of Mississippi*, 332 U.S. 463 (1947); *Avery* v. *State of Georgia*, 345 U.S. 559 (1953); *Eubanks* v. *State of Louisiana*, 336 U.S. 584 (1958); *Whitus* v. *State of Georgia*, 385 U.S. 545 (1967).

The systematic exclusion of Negroes from juries in judicial districts where Negroes represent a substantial part of the population constitutes a deprivation of equal protection under the Fourteenth Amendment. *Patton* v. *State of Mississippi*, supra.

It is constitutionally imperative that the grand jury must be a "body truly representative of the community." *Smith* v. *Texas*, 311 U.S. 128, 130 (1960); *Brooks* v. *Beto*, 366 F.2d 1 (5 Cir. 1966); *Goins* v. *Algood*, 391 F.2d 692 (5 Cir. 1968).

When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any racial group, indictments and verdicts returned against them by juries thus selected cannot stand. *Patton* v. *State of Mississippi*, supra.

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas*, 311 U.S. 128; 61 S.Ct. 164 (1940); *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457 (1942); *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, 66 S.Ct. 984 (1946).

Very decided variations in proportions of Negroes and Whites on jury lists from racial proportions in the population, which variations are not explained and are long-continued, furnish sufficient evidence of systematic exclusion of Negroes from jury service. *Brown* v. *Allen*, 344 U.S. 443, 471, 73 S.Ct. 397 (1953).

State exclusion of Negroes from grand and petit juries solely because of their race denied Negro defendants in criminal cases the equal protection of the laws required

by the Fourteenth Amendment, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials. *Patton* v. *Mississippi*, supra.

Jury commissioners and other officials responsible for the selection of grand juries are under a constitutional duty to follow a procedure—a course of conduct—which will not operate to discriminate in the selection of jurors on racial grounds. *Hill* v. *Texas*, 316 U.S. 400, 62 S.Ct. 1159 (1942); *Brooks* v. *Beto*, supra.

Affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *Turner* v. *Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970); *Alexander* v. *Louisiana*, 92 S.Ct. 1221 (1972); *Norris* v. *State of Alabama*, 294 U.S. 587, 55 S.Ct. 579 (1935).

Mere assertion by jury commissioners that they had not practiced discrimination in selecting jurors is not sufficient to rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution even though the jury commissioners testify that their only objective is to select those whom they think are best qualified. *Hernandez* v. *State of Texas*, 347 U.S. 475, 74 S.Ct. 667 (1954).

The discrimination complained of need not be intentional. It is not necessary to go as far as to establish ill will, evil motive or absence of good faith but that objective results are largely to be relief on in the application of the constitutional test. *United States, ex rel Seals* v. *Wiman*, 304 F.2d 53 (5 Cir. 1962).

The Constitution does not require an exact proportion between the percentage of Negroes in the population and the percentage of Negroes on the jury lists, nor does the Constitution require that any particular panel of jurors in a criminal trial include members of the accused person's race. *Swain* v. *State of Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965).

The inclusion of a minimal or token number of Negroes on a jury list does not prevent the systematic exclusion rule from operating. *Brown* v. *Allen*, supra; *Smith* v. *State of Texas*, supra.

The disparity between the percentage of Negroes on the Tax Digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to the conclusion that discrimination was present. *Whitus* v. *Georgia*, 385 U.S. 545, 87 S.Ct. 643 (1967).

Whether there has been a systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case. *Patton* v. *State of Mississippi*, *supra*.

The Courts have consistently held that statistics speak louder than the jury commissioners. *Brooks* v. *Beto*, supra.

The exclusion of all those who earn a daily wage cannot be justified by Federal or State law. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. *Thiel* v. *Southern Pacific Company*, supra.

The systematic exclusion, as a class, of all manual laborers, outside workers, artisans, and earners making a daily wage deprives the petitioner of an impartial jury, a cross-section of the community in violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment. *Labat* v. *Bennett*, 365 F.2d 698 (5 Cir. 1966).

The burden is, of course, on the petitioners to prove the existence of purposeful discrimination, *Terrance* v. *State of Florida*, 188 U.S. 519, 23 S.Ct. 402 (1903). However, once a prima facie case is made out the burden shifts to the prosecution. *Whitus* v. *Georgia*, supra.

If the petitioner establishes a prima facie case that there was discrimination in selection of the grand jury that returned the indictment, the burden shifts to the State to come forward with rebuttal evidence and a constitutionally acceptable explanation for the facts that give rise to the inference of deliberate and intentional discrimination. *Labat* v. *Bennett*, supra; *Hamilton* v. *Watkins*, 436 F.2d 1323 (5 Cir. 1970).

The Courts take judicial notice of the census figures. *Goins* v. *Allgood*, supra.

The proper disposition where a state court conviction is set aside on the ground of jury discrimination is for the petitioner to be re-indicted and re-tried by a procedure which conforms to constitutional requirements. *Hill* v. *Texas*, supra; *Whitus* v. *Georgia*, supra.

RECOMMENDATIONS

Since petitioner established a prima facie case of discrimination in selecting the Grand Jury that returned the indictment against him, and since the State failed to come forward with rebuttal evidence and a constitutionally acceptable explanation for the facts that gave rise to the inference of deliberate and intentional discrimination, and further, since the State admitted that daily wage earners were excluded from the Grand Jury that returned the indictment against petitioner, I recommend the relief sought in the petition for writ of habeas corpus be granted, and that the conviction of John Newman for violating L.R.S. 14:42, aggravated rape, in State of Louisiana v. John Newman, Orleans Parish Criminal District Court, No. 177,218, be vacated and set aside.

I also recommend that the State of Louisiana be given a reasonable time in which to re-indict and re-try the petitioner by a procedure which conforms to constitutional requirements. I further recommend that if the State of Louisiana fails to re-indict and re-try petitioner within a reasonable time, this Court order petitioner's release from custody forthwith.

Respectfully submitted,

/s/ Harry Lee
HARRY LEE
United States Magistrate

April 10, 1973

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

MEMORANDUM OF REASONS (No. 72-719 "G")

(Title Omitted)

Filed: Sept. 20, 1973

When 17 years old the petitioner, represented by court appointed, uncompensated counsel, was convicted by jury of murder. On June 29, 1965, he was sentenced to life imprisonment. No direct appeal was taken.

In September of 1970, the petitioner requested a copy of his transcript for the purpose of perfecting an appeal. This request was refused. Petitioner filed a habeas petition in State trial court contending that: (1) he was deprived of his right to an appeal and access to his transcript; and (2) the grand jury which indicted him was defective since negroes were systematically excluded from service.

The State court with regard to the first contention, held that the petitioner's failure to file the proper pretrial motion was fatal to that contention. Moreover, the right to challenge the constitutionality of the grand jury had prescribed.

The petitioner's application for writs of certiorari and habeas corpus to the Supreme Court of Louisiana on these issues was denied. Therefore, it appears that the petitioner has exhausted his available state remedies with regard to these issues.

The question before this Court is twofold: (1) did the petitioner waive his right to an appeal; and (2) does systematic exclusion of negroes from the grand jury constitute grounds for habeas relief despite an apparent failure to timely raise the issue in state court.

First, the State courts may have erred in holding that the petitioner waived his right to an appeal.

In a decision from this Circuit as early as 1938, the United States Supreme Court held that courts should indulge every reasonable presumption agains the waiver

of constitutional rights, *Johnson* v. *Zerbst*, 1938, 304 U.S. 458. It does not appear that any such indulgence was made with regard to this petitioner. This concept was reiterated in *Fay* v. *Noia*, 1963, 372 U.S. 391, when the Supreme Court held that the petitioner had not waived his right to an appeal. At a 1971 evidentiary hearing there was conflicting testimony concerning the petitioner's waiver of his appeal, the implication being, however, that the waiver was made by the petitioner's court appointed attorneys over his objections.[1] Furthermore, the

[1] A. "We told him we wouldn't take an appeal and he told his family that he kept hollering for an appeal."
(Hearing transcript 25)

* * * *

Q. "The defendant wanted an appeal and you and Mr. Tureaud advised him against it?"
A. "Under the circumstances, yes."
Q. "How old was he at the time, if you recall?"
A. "He was seventeen the day of the trial. He was sixteen when the act was supposed to have occurred."
(Hearing transcript 26)

* * * *

Q. "Did the defendant still persist that he wanted to appeal?
A. "Well, I think his parents imposed it upon him. He was a minor at the time and they followed our advice. Francis is a man but he was a terrified, young seventeen year old. I think that after a length of time he just sat there."
Q. "Do you know if the Court informed him upon sentence that he had a right to appeal?"
A. "The Court didn't inform him about anything."
(Hearing transcript 28)

* * * *

Q. "Did you and Mr. Tureaud in fact advise the defendant he had a right to appeal in this case?"
A. "After all of that kind of noise being made we told him he had a right to appeal. We didn't say any of those words, you can go up higher. It is best that you take this sentence, the jury saved your life and that's it. All of this about you have a right to appeal, we don't do it, nobody else was doing it that day. . . ."
(Hearing transcript 29)

* * * *

[Footnote continued on page 89]

excerpt from the sentencing proceedings indicates that the sentencing court failed to determine whether or not petitioner's waiver was an "intentional relinquishment of a known right or privilege," as was required at the time per *Fay* and *Johnson*, both supra.[2]

Secondly, although the petitioner is precluded from raising the issue of the constitutionality of the grand jury which indicted him in state court because of procedural impediments, he is not so estopped in this Court. Louisiana State law requires that objection be made "before the third judicial day of the term of which said jury shall have been drawn, or before entering upon the trial of the case if it began sooner."[3] Obviously, the petitioner cannot now challenge his grand jury in state court. However, barring some intentional relinquishing or abandonment, there has been no waiver as far as the federal courts are concerned. *Hamilton* v. *Watkins*, 5th Cir. 1970, 436 F.2d 1323. See also *Fay* v. *Noia*, supra; *Johnson* v. *Zerbst*, supra; and *Labat* v. *Bennett*, 5th Cir. 1966, 365 F.2d 698. This trilogy of

[1] [Continued]

Q. "You were negotiating a plea bargain at that time?"
A. "I don't know what you call it."
Q. "What would you call it?"
A. "I don't know."
Q. "I am asking you what you would call it."
A. "We were doing the best at that time for our client."
Q. "That's bargaining?"
A. "I don't know, a deal I guess you would call it."
(Hearing transcript 41)

Later the chief prosecutor was asked whether he engaged in any type of bargaining and he answered:

A. "No, Mr. Winsberg, I don't for this reason. I could have really cared less. . . ."
(Hearing transcript 84)

[2] The determination by the trial judge as to whether the petitioner's waiver was an intentional relinquishment of a known privilege was merely the question:

A. "Does this defendant state at this time he does not intend to take an appeal?"
and the answer:
A. "I am not."

[3] LSA-R.S. 15:202.

cases involves the precise question of waiver and all hold that there must be an intentional relinquishment of a known right or privilege, an element not apparently here.[4] It is also noted that with the exception of *Labat* all of these cases preceded the petitioner's trial.

For the above stated reasons, therefore, it is this Court's determination that the petitioner did not waive his right to an appeal. This question, however, appears moot since this court finds his indicting grand jury constitutionally defective. Although, according to state law, he may have waived his right to contest the constitutionality of his grand jury in state court, he has not so waived the right to raise the same question in federal court. Petitioner's failure to comply with state procedural rules bars consideration on the merits in any state forum as a matter of state law. Since, however, a federal question is involved, whether petitioner's due process and equal protection rights were violated by the systematic exclusion of negroes from his grand jury, there is no bar to determination of this question in a federal habeas corpus proceeding. See *Noia*, *Labat*, and *Hamilton*, all supra. Moreover, *Labat* mandates such action.

It is noted that the State argues that the recent U.S. Supreme Court case, *Davis* v. *United States*, 1973, 93 S.Ct. 1577, precludes the petitioner from now challenging the validity of his grand jury by way of habeas corpus.

In *Davis* the Supreme Court, in a federal criminal case, held that the standards applied in habeas corpus should be no less lenient than those in the proceeding itself. Mr. Justice Rehnquist, however, also held in his majority opinion that "We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that rule may not later be resurrected, either in the criminal

[4] In *Fay* the waiver pertained to the right to appeal, in *Johnson* it pertained to counsel, and in *Labat* it was pertaining to a challenge of the jury system. * It is noted that although the petitioner was represented by counsel, his chief counsel had not been associated with criminal cases for many years. Moreover, he was in failing health at the time. As in *Labat*, this may explain the failure to timely raise this issue.

proceedings or in federal habeas in the absence of the showing of "cause" which that rule requires."

The situation in this case differs greatly from the situation in *Davis* and for this reason this Court cannot apply the *Davis* rationale.

Firstly, as was previously discussed, this Court fails to find that there was a waiver.

Secondly, assuming arguendo, that mere failure to raise the issue, as per the rules of procedure, constituted waiver this Court would find "cause" which would justify relief. In Davis, the " 'Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury.' " In the case at bar the petitioner has a viable explanation.[5]

Thirdly, as Judge Christenberry held in *U. S. ex rel Bruce Barksdale* v. *C. Murray Henderson*, E D. La. 1973, CA 71-2411, *Davis* should be read with *Tollett* v. *Henderson*, 1973, 93 S.Ct. 1602. The *Tollett* Court held that the issue of whether grand jury exclusion might be raised on federal habeas after a plea of not guilty and trial by jury is an open question. Accordingly, Judge Christenberry held "In the absence of further elucidation on this question from the Supreme Court, the law in this Circuit remains that a state prisoner is not precluded from raising the issue of racial exclusion by way of habeas corpus. See e.g., Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966)."

It is apparent, from the information and statistics provided by the Magistrate's report, that the conclusion that the grand jury was defective is inescapable. The same practices condemned in *Labat* were extant at the time of the petitioner's indictment.[6] In *Labat* the Court said:

> "We find this explanation unacceptable. (A) The exclusion of daily wage earners as a class violates

[5] See the Criminal District Court's order denying habeas relief. Trial record p. 3.

[6] The practice referred to is that of excluding hourly wage earners which, in effect, limited the number of blacks in the pool of potential jurors. See Magistrate's Report p. 4.

the petitioner's due process and equal protection rights to an im, rtial jury representing a cross-section of the community. (B) The exclusion of this large class, 47 per cent of all Negro workers in Orleans Parish, as the district judge found, discriminates against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of Negroes. (C) Contrary to the district court's holding there is no Louisiana statutory authority permitting jury selection officials to exempt daily wage earners as a class."

Accordingly, this Court is forced to order the conviction of the defendant set aside and to require the State to re-indict and retry the defendant, assuming the State is so inclined. In the event the State does not proceed to re-try the defendant within 180 days, then petitioner's counsel should bring a motion before the Court asking for the defendant's full and final release from custody. The Court retains jurisdiction.

Sept. 20, 1973

/s/ JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

Lolis Elie, Esq.
George M. Strickler, Esq.
Russell J. Schonekas, Esq.
G. Thos. Porteous, Jr., Esq.
Abraham Francis
C. Murray Henderson, Warden

ORDER (No. 72-719 "G")

(Title Omitted)

Filed: Sept. 20, 1973

Based on the Memorandum of Reasons filed herewith,
IT IS ORDERED that the application for a writ of habeas corpus by the petitioner Abraham Francis be and the same is hereby, granted, but execution of the writ and release of the defendant is postponed affording the State of Louisiana 180 days from the date of this order within which to indict and try the defendant, failing which counsel for the petitioner should bring forth a motion for the full and final release of the petitioner Abraham Francis.

September 20, 1973.

/s/ JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 73-3393, 73-3670

JOHN NEWMAN, PETITIONER-APPELLEE

v.

C. MURRAY HENDERSON, Warden, Louisiana State Penitentiary, RESPONDENT-APPELLANT

ABRAHAM FRANCIS, PETITIONER-APPELLEE

v.

C. MURRAY HENDERSON, Warden, Louisiana State Penitentiary, RESPONDENT-APPELLANT

June 28, 1974

Appeals were taken from the grants of Louisiana prisoners' petitions for writ of habeas corpus by the United States District Court for the Eastern District of Louisiana, at New Orleans, Frederick J. R. Heebe, Chief Judge, and James A. Comiskey, J. The appeals were consolidated. The Court of Appeals, Dyer, Circuit Judge, held that with respect to petitioner who had not shown prejudice Louisiana rule providing for waiver of challenges to jury not timely raised precluded considering his federal habeas corpus petition based on challenge to grand jury, but with respect to the other prisoner who had not had opportunity to show prejudice, his case would be remanded for opportunity to make such showing with respect to his grand jury challenge.

Grant of petition as to one prisoner vacated and case remanded with directions to dismiss petition and grant of petition to other prisoner vacated and case remanded for further proceedings.

1. Habeas Corpus § 45.3(1)

Where Louisiana prisoner's claim of discrimination in composition of grand jury which returned indictment against him was rejected by Louisiana court, in proceeding after conviction, on ground that grand jury system prevailing at time of indictment had not been discriminatory, Louisiana rule providing that challenges to jury are deemed waived if not timely raised prior to trial precluded relief on his petition for federal habeas corpus based on claim of discrimination in composition of grand jury. LSA-C.Cr.P. art. 535; 28 U.S.C.A. § 2254.

2. Habeas Corpus § 45.3(1)

Louisiana rule, made absolute in form, providing that the challenges to selection of jury are deemed waived if not raised timely prior to trial must have an exception engrafted thereon to allow federal habeas corpus court to excuse noncompliance with statute procedural requirements when petitioner can demonstrate actual prejudice. LSA-C.Cr.P. art. 535; 28 U.S.C.A. § 2254.

3. Habeas Corpus § 113(13)

Where Louisiana prisoner, who unsuccessfully sought habeas corpus relief in Louisiana court which rejected prisoner's challenge to validity of grand jury selection procedures since he had failed to file objection within period specified by applicable Louisiana rule, had not had a chance to show prejudice, his petition for federal habeas corpus based on claim of improper selection procedure for grand jury which indicted him must be remanded and petitioner given an opportunity to make showing of prejudice which would preclude application of waiver rule. LSA-C.Cr.P. art. 535; 28 U.S.C.A. § 2254.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before DYER and MORGAN, Circuit Judges, and KRAFT, District Judge.

DYER, Circuit Judge:

These consolidated appeals raise the question of whether a state prisoner may challenge the validity of his indictment in a federal habeas corpus proceeding when a state rule of procedure prohibits the issue from being untimely raised in state court. We adhere to the principle that a district court cannot disregard the operation of a state waiver rule, absent a showing of actual prejudice by the habeas petitioner. Because the relief granted by the district courts did not comport with this waiver-by-failure-to-object principle, the district courts' writs must be vacated.

Newman was indicted by an Orleans Parish, Louisiana, grand jury in October, 1962 for aggravated rape and was convicted after a jury trial for that offense. Francis was indicted for felony murder by a grand jury in the same parish in December of 1964 and was subsequently found guilty by a jury of the offense charged. Thereafter both Newman and Francis unsuccessfully sought habeas relief in the Louisiana courts, alleging, *inter alia*, racial discrimination in the selection of their grand juries. Newman's petition was rejected on the ground that the grand jury system prevailing at the time of his indictment had not been discriminatory. In Francis' case, however, the state habeas court did not reach the merits of his contention, but held instead that Francis had waived the right to challenge the validity of the grand jury selection procedure since he had failed to file an objection within the period specified by the applicable Louisiana rule of criminal procedure.[1] It is undisputed that neither Newman nor Francis timely challenged their

[1] The rule then applicable was contained in LSA-R.S. 15:202:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

The statute has since been repealed and replaced by LSA-C.Cr.P. art. 535.

indictments on the basis of unconstitutionally constituted grand juries.

Failing to obtain relief in the Louisiana courts, the prisoners sought writs of habeas corpus in federal court pursuant to 28 U.S.C.A. § 2254. In each case the district courts concluded that the state had failed to show that the petitioners had deliberately by-passed state procedures and had failed to rebut the prima facie showing of discrimination in selecting grand juries. The district court which granted relief to Francis found alternatively that the petitioner had a "viable explanation" for his failure to file a timely challenge to the indictment. The court reasoned that if the matter had been presented by a *federal* prisoner seeking to avoid the waiver provision of F.R.Crim.P. 12(b)(2), the court would have found "cause" within the meaning of that Rule so as to justify relief.[2] The factual basis for the court's finding was that Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the time for challenging the indictment to pass without objecting to the grand jury's composition.

In appealing from the grant of federal habeas relief to Newman and Francis, Louisiana argues that the district courts erred by applying the "deliberate by-pass" test of Fay v. Noia, 1963, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, rather than the waiver-by-failure-to-object principle set forth in Davis v. United States, 1973, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216. In *Davis* the Supreme Court held that failure to raise an objection to the indictment prior to trial barred consideration of the alleged defect in the indictment in a collateral attack, unless the court found "cause shown" to excuse the operation of the express waiver provision. Although the *Davis* decision was rendered prior to the federal dis-

[2] F.R.Crim.P. 12(b)(2) provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

trict courts' disposition of these cases, the record shows that the district judge in acting on Newman's petition did not consider *Davis* at all. The apparent reason for this omission is that the court relied on a magistrate's report prepared prior to the Supreme Court's opinion in *Davis*. On the other hand, the district court which granted Francis' petition considered the *Davis* holding, but accepted the distinction now urged by both Francis and Newman, that the decision concerned a federal prisoner and therefore has no application to a *state* prisoner seeking *federal* habeas relief.

This Circuit has already rejected the attempt to limit *Davis* to its precise facts. We recently affirmed the denial of a federal habeas petition challenging the selection of a Louisiana grand jury on the basis of the waiver provision contained in the present Louisiana rule.[3] Jones v. Henderson, 5 Cir. 1974, 494 F.2d 47. *See also* Marlin v. Florida, 5 Cir. 1974, 489 F.2d 702; Rivera v. Wainwright, 5 Cir. 1974, 488 F.2d 275.

[1] The record before us in Newman's case discloses nothing that would take his federal habeas claim outside the reach of *Davis* and our decision in Jones v. Henderson, *supra*. Therefore, we vacate the order of the district court and remand the case with directions to dismiss Newman's petition for habeas corpus.

Francis' petition, however, raises a more troublesome issue. Unlike the Florida waiver provision considered in *Rivera* and *Marlin*, *supra*, which is identical to Rule 12 (b) (2), the Louisiana rule now before us purports to be absolute; that is, there is no "cause shown" exception comparable to the provision in the rules which we have previously considered.[4] The difference in procedural provisions requires an examination of the exception to the waiver-by-failure-to-object principle.

---

[3] *See* note 1, *supra*.

[4] The *Jones* opinion did not discuss the issue of whether noncompliance with the present Louisiana rule might be excused, although the Court did note that the petitioner had been represented by competent counsel. *Cf.* Tollett v. Henderson, 1973, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235.

The Supreme Court in *Davis* accepted the district court's determination that there had been no "cause shown" to justify relief from the waiver provision of Rule 12(b)(2). The lower court's findings of fact persuaded the Supreme Court that Davis had not been prejudiced by the allegedly unconstitutional grand jury selection procedure. In recognition of the Rule's provision that a showing of prejudice overrides the interest of having an "airtight system of forfeitures," the Court stated:

> The presumption of prejudice which supports the existence of the right [as in Peters v. Kiff, 1972, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83] is not inconsistent with a holding that *actual prejudice* must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

Davis, *supra*, at 245 (emphasis supplied).

[2] We believe that such an exception must be engrafted on the Louisiana statute to allow a federal habeas court to excuse noncompliance with state procedural requirements when the petitioner can demonstrate actual prejudice. The state's interest in requiring the timely filing of motions, especially motions which may abort a criminal prosecution, is indeed strong. But the countervailing concern was expressed by the Supreme Court in Fay v. Noia, *supra*, at 431: "Of course orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such [a] procedure. But that state interest 'competes . . . against an ideal . . . [the] ideal of fair procedure.'"

By way of illustration, consider a hypothetical twist on the factual situation present in *Davis*. In that case, the petitioner, a black, was indicted along with his two white accomplices. The case against him, the district court found, was a strong one, although largely circumstantial. Moreover, ample evidence was adduced to justify a grand jury's determination that Davis should stand trial. If, unlike *Davis*, however, an unconstitutionally selected grand jury had chosen not to indict the

white participants but instead to indict only the black perpetrator, and if a collateral attack on the underlying conviction was made which seriously challenged the sufficiency of the evidence even to indict, a federal court would not be powerless to grant habeas relief. Fundamental fairness requires that a federal court be able to remedy such a wrong in spite of a procedural defect such as failing to file a timely objection to the indictment, assuming, of course, that noncompliance with the state rule was not merely a deliberate tactical maneuver.

[3] We conclude, therefore, that the Louisiana waiver provision must be given effect by the federal district courts unless there is a showing of actual prejudice. Consequently, the order of the district court granting Francis' habeas petition must be vacated, and the case remanded to permit a determination of whether the facts presented by Francis constitute a showing of prejudice which would excuse his non-compliance with the state's rule of criminal procedure.

Vacated and remanded with directions to dismiss with respect to Newman. Vacated and remanded for further proceedings consistent with this opinion with respect to Francis.

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-5808

ABRAHAM FRANCIS, PETITIONER

v.

C. MURRAY HENDERSON, Warden

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Fifth Circuit,

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 28, 1975

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-5808

ABRAHAM FRANCIS
Petitioner

Versus

C. MURRAY HENDERSON, WARDEN
LOUISIANA STATE PENITENTIARY,
Respondent

On Application For Writ Of Certiorari To
the United States Court Of Appeals for
The Fifth Circuit

RESPONSE OF STATE OF LOUISIANA

In 1964 Abraham Francis, petitioner herein, was indicted for murder by the Orleans Parish Grand Jury. In 1965 Francis was tried in the Criminal District Court for the Parish of Orleans, found guilty, and sentenced to life imprisonment. At no time, either prior to or during his trial, did Francis challenge the method of jury selection in Orleans Parish, thus waiving the issue under the then existing procedural statute, La. R.S. 15:202, as interpreted by the Louisiana Supreme Court in State v. Wilson, 204 La. 24, 14 So.2d 873 (1943), and State v. Chianelli, 226 La. 552, 76 So.2d 727 (1954), to the effect that in Louisiana an attack on the grand jury must be made before the end of the third day after expiration of the grand jury's

term, or before trial, whichever is earlier; that an objection to a petit jury must be filed some time prior to trial; and that if the jury issue is not timely raised it is waived. See Michel v. Louisiana, 350 U.S. 91 (1955).

Francis did not appeal his conviction to the Louisiana Supreme Court. However, in 1971 he filed a Petition For Writ of Habeas Corpus in the Criminal District Court for the Parish of Orleans, alleging that the grand and petit juries in his case had been chosen in a manner which discriminated against the black race, of which he is a member. The Louisiana trial court held that Francis had waived his right to raise such questions by not urging them timely. The Louisiana Supreme Court also denied Francis' Petition for Writ of Habeas Corpus.

Thereafter, in March of 1972, Francis filed his Petition For Writ Of Habeas Corpus in the United States District Court for the Eastern District of Louisiana. In September of 1973 the United States District Court set aside Francis' conviction and sentence on the ground that the Grand Jury which indicted him was invalidly selected. Relying on Davis v. United States, 411 U.S. 233 (1973), the State of Louisiana appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit reaffirmed its earlier holding in Jones v. Henderson, 494 F.2d 47 (1974), and, relying on Davis v. United States, supra, held that Francis had waived his right to attack the composition of his juries by not acting timely, but remanded the matter to the United States District Court to enable Francis to attempt to avoid the waiver principle by showing actual prejudice. Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974).

ARGUMENT

I.

The Waiver Principle Of Davis Should Apply Equally To The Several States

In Davis v. United States, 411 U.S. 233 (1973), the accused, a black man, went to trial without objecting to the composition of the grand jury which indicted him, an issue which under Rule 12 (b)(2) of the Federal Rules of Criminal Procedure must be raised by motion prior to trial. Approximately three years after his conviction Davis filed a motion to dismiss the indictment pursuant to 28 U.S.C. 2255, alleging that qualified Negro jurymen had been systematically excluded from the grand jury which indicted him, and that his collateral attack on his conviction could be precluded only after a hearing in which it was established that he deliberately bypassed or understandingly and knowingly waived his claim to unconstitutional grand jury composition, relying, inter alia, on Fay v. Noia, 372 U.S. 391 (1963), and Kaufman v. United States, 394 U.S. 217 (1969). In holding that Davis had waived his right to challenge the composition of his grand jury, this Court said: (at 411 U.S. 241-242)

> "The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If

its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

"* * *

"We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to

that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review."

The State of Louisiana respectfully submits that the reasoning of Davis applies equally well to state criminal proceedings. At the time of Francis' trial in 1965, La. R.S.15:202 (as interpreted in State v. Wilson and State v. Chianelli, supra) provided that in Louisiana criminal proceedings an attack on a grand jury must be made before the end of the third day after the expiration of the grand jury's term, or before trial, whichever was earlier; and that a challenge to the petit jury must be filed some time prior to trial, "otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." See Michel v. Louisiana, supra, in which this Court held that the waiver provisions of La. R.S. 15:202 did not violate the Fourteenth Amendment.

Surely this Court will not apply a stricter rule to the several states than it does to the federal government. The waiver standard expressed in former La. R.S. 15:202 should govern an untimely claim of jury discrimination not only during the Louisiana criminal proceeding, but also later on federal

collateral review. The rule of Davis should in all fairness be available to the several states.

II.

The "Actual Prejudice" Principle of Davis Should Also Apply To The Several States

In Davis this Court quoted with approval the following exerpt from its opinion in Shotwell Mfg. Co. v. United States, 37 1 U.S. 341 (1963), on which the lower court had relied in denying relief, regarding the question of prejudice:

> ". . . where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." 371 U.S. at 363.

Thereafter, this Court's opinion in Davis continues thus: (411 U.S. at 244-245)

> "Petitioner seeks to avoid this aspect of Shotwell by asserting that there both lower courts had found that petitioners were not prejudiced in any way by the alleged illegalities whereas under Peters v. Kiff, 407 U.S. 493 (1972), prejudice is presumed in cases where there is an allegation of racial discrimination in grand jury composition.

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But Peters dealt with whether or not a white man had a substantive constitutional right to set aside his conviction upon proof that Negroes had been systematically excluded from the state grand and petit juries which indicted and tried him. Three Justices dissented from the Court's holding of such a substantive right on the ground that no prejudice had been shown, and three concurred separately in the judgment. But the three opinions delivered in Peters, supra, all indicate a focus on the existence of the constitutional right, rather than its possible loss through delay in asserting it. The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." (Emphasis ours)

In the interest of finality and reasonably current dockets, the State of Louisiana respectfully submits that for the several states as well as for the federal government the waiver-by-failure-to-object and actual-prejudice principles of Davis v. United States should prevail over the "deliberate bypass" test of Fay v. Noia, 372 U.S. 391 (1963). Otherwise, the administration of criminal justice in the several states will continue to be unduly hobbled by the relitigation of ancient

-7-

issues which were waived by not being timely raised at the original trial. In the words of Longfellow, the State of Louisiana urges this Court to "Let the dead Past bury its dead!"*/

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny Abraham Francis' Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

WILLIAM J. GUSTE, JR.,
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ASSISTANT ATTORNEY GENERAL
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HARRY F. CONNICK,
DISTRICT ATTORNEY FOR THE
PARISH OF ORLEANS

LOUISE KORNS,
ASSISTANT DISTRICT ATTORNEY
FOR THE PARISH OF ORLEANS

Louise Korns

---

*/ Psalm Of Life.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-5808

ABRAHAM FRANCIS,

Petitioner,

v.

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-5808

ABRAHAM FRANCIS,

Petitioner,

v.

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The original opinion of the United States District Court for the Eastern District of Louisiana is unreported. A copy of that decision is at pages 87-92 of the Appendix. The opinion of the United States

Court of Appeals for the Fifth Circuit is reported at 496 F.2d 896 (5th Cir. 1974). It is reprinted in the Appendix at pages 94-100.

JURISDICTION

The original decision of the Court of Appeals was entered on June 28, 1974. A timely petition for rehearing and rehearing *en banc* was filed and was denied on October 7, 1974. 502 F.2d 1167. The petition for a writ of certiorari was filed on January 4, 1975. Certiorari was granted on April 28, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

DO *FAY V. NOIA*, 372 U.S. 391 (1963) AND *JOHNSON V. ZERBST*, 304 U.S. 485 (1938) PROVIDE THE STANDARD FOR DETERMINING WAIVER AND THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF FOR A CONVICTED STATE PRISONER WHO DID NOT COMPLY WITH STATE PROCEDURAL RULES FOR CHALLENGING THE GRAND JURY WHICH INDICTED HIM?

II.

IF *DAVIS V. UNITED STATES*, 411 U.S. 223 (1973) PROVIDES THE STANDARD BY WHICH TO JUDGE THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF FOR A CONVICTED STATE PRISONER WHO DID NOT COMPLY WITH STATE PROCEDURAL RULES FOR CHALLENGING THE GRAND JURY WHICH INDICTED HIM, IS THE TEST ONE OF "CAUSE" OR MUST A PETITIONER SHOW "ACTUAL PREJUDICE"?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

. . . nor shall any state deprive any person of life, liberty, or property without due process of law. . .

STATUTORY PROVISION INVOLVED

Louisiana, Revised Statutes, Title 15, Section 202.

All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against an array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

TITLE 28 U.S.C. §2254

§2254. State Custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the

record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

Certiorari was granted in this case to review a decision of the United States Court of Appeals for the Fifth Circuit which held that a Louisiana defendant who failed to make a timely challenge to the grand jury which indicted him was precluded from maintaining that challenge in a federal habeas corpus action unless

he could demonstrate "actual prejudice" flowing from his indictment. Only such a showing, according to the opinion below, would excuse his non-compliance with the state procedural rule.

The Fifth Circuit opinion vacated the judgment of the United States District Court for the Eastern District of Louisiana which had held that the petitioner did not knowingly and intelligently waive his state court right to make a grand jury challenge and that in any event, he had shown "cause" which excused his failure to make a timely challenge.

This case began in New Orleans, Louisiana in 1964.

A. The Original Trial Proceedings.

On December 10, 1964, Abraham Francis, a black 17 year old boy, was indicted on a charge of felony murder by the Orleans Parish grand jury. App. 8-9. The charge was an outgrowth of a robbery of a white couple by several black males in which one of the alleged robbers was killed. It was the first time in the recollected history of Orleans Parish that a person had been charged with felony murder when the deceased was a co-perpetrator. App. 71. At the time of the alleged offense, Francis was 16 years old. App. 56. Death was the maximum penalty which could be imposed.

Two months later on February 9, 1965, the State trial judge appointed an attorney for Francis. App. 12. The lawyer, A. P. Tureaud, a black New Orleans attorney, "Hadn't handled any criminal matters for years." App. 31. He, "Hadn't handled a murder case in about fifteen years." App. 23.

Because of Tureaud's lack of experience, he asked Earl J. Amadee, another black New Orleans lawyer, to assist him as a "trial expert." App. 27.[1]

The day before trial, June 23, 1965, Tureaud filed his first motion, a Motion for Continuance. App. 13. He sought a continuance so that he could have additional time to file motions "appropriate to [Francis'] defense." App. 13. On the same day Tureaud and Amedee filed a Prayer for Oyer, an application for Bill of Particulars, and a Motion to Quash the Indictment on the ground that it was vague. App. 14-18.[2] None of the motions were granted, except that

[1]The facts surrounding Francis' trial representation were elicited in a 1971 hearing on the habeas corpus petition that he filed in State court seeking an out of time appeal and other relief. App. 22. The description of the events which occurred then was provided by Amadee. Tureaud (his name is incorrectly spelled "Touro" in the transcript), who Amadee described as "very old", was seriously ill at the time of the state habeas hearing. App. 27. He is now dead.

Amadee had been "co-appointed" to represent one of the original co-defendants, Jerry Anderson. App. 26-27. It seems that he also had some representative interest in a third co-defendant, Paul Honore. App. 28. Honore had his own appointed counsel, but Amadee described his role with Honore this way:

> If you want to consider me as co-counsel you can. I hate to say it, Honore was my client and I am trying to help him, he was related to me your Honor. App. 28.

Anderson and Honore pled guilty prior to trial and each received a sentence of eight years. App. 8.

[2]The Motions were merely copies of motions which had been filed for another defendant with the name of that defendant struck through in pen and Francis' name substituted. The Motion for a Continuance was a form used by the District Attorney which Tureaud, by striking through with a pen, adapted for his own use. See original trial record.

some response was made by the State to the Bill of Particulars and Prayer for Oyer which the trial judge deemed to be sufficient. App. 55. No challenge was made to the grand jury which returned the indictment.

On the day of trial, Tureaud and Amadee filed a Motion to Suppress aimed at excluding the statements that Francis had made to the police. App. 19. It was denied without a hearing. App. 52-53. Amadee felt strongly that good constitutional grounds existed to support the Motion and he recalled that he reserved a bill of exception to the denial. App. 34-35, 39. The record did not reflect the reservation of a bill of exception. App. 62-63.

Francis' trial took one day – June 24, 1965. He was convicted of felony murder and on June 29, 1965 received a sentence of life imprisonment. App. 9.

Amadee testified that Francis desired an appeal, but he and Tureaud advised against it because they thought that he might then be prosecuted on the robbery charge which was the underlying basis for the felony murder indictment, and receive an additional thirty year imprisonment. App. 35.[3] Amadee and Tureaud had other reasons for advising against an appeal. Amadee explained:

> Well, I think that everybody felt that the jury had been lenient on him because of his youth and he got a break that they did not find him guilty as charged [no death sentence] and I am not going to kid, we did not want to be tied up with the

[3]The "general consensus" was that a term of years could not be imposed consecutively to a life sentence. One of the men who prosecuted Francis testified to that and also said that he did not know of any cases where it had been done. App. 67.

rest of our lives with a court appointed case. When we heard the facts throughout the trial and as it appears to us, we would be wasting our time as lawyers.

App. 36.

The Court did not inform Francis of his right to appeal. The colloquy on that issue was:

Q. Does this Defendant state at this time that he does not intend to take an appeal?

A. I am not.

App. 21.

Thus, Abraham Francis, a "terrified young 17 year old," App. 37, began his life sentence.

B. The State Post Conviction Proceedings and the Failure to Challenge The Grand Jury.

In September 1970, Francis wrote to the Judge who presided over his trial and requested a transcript of the proceedings. Because no appeal had been taken and because no specific errors were alleged in the letter, the Judge refused to provide a transcript to Francis. App. 76. On June 10, 1971, Francis filed a *pro se* petition for writ of habeas corpus in the State trial court. He alleged that he was denied his right to appeal, sought a trial transcript so he could appeal, and alleged that he had been indicted by a grand jury from which Negroes were excluded. App. 76. The court appointed counsel for Francis and on June 28, 1971 conducted the hearing which elicited the Amadee testimony.

Amadee stated, and the record reflected, that he was never formally appointed to represent Francis. His

informal role before and during the trial was ambiguous. App. 27, 31. But there is no doubt that Tureaud was "chief counsel" and ultimately responsible for Francis' representation. App. 31. Amadee placed the failure to challenge the grand jury composition squarely upon Tureaud's shoulders:

Q. Can you tell the Court is there any reason why you didn't attack the Grand Jury set up or the Petit Jury set up in Orleans Parish in your motion to quash?

A. I would believe and not trying to pass the buck that Mr. Touro didn't want to do it. There were blacks on the Grand Jury and black (sic) in the Petit Jury panel and he has his own ideas about things, you know.

Q. Did you all discuss that fact as whether you all should attack the Venire of the Grand Jury and the Petit Juries of Orleans Parish?

A. I don't recal (sic) but like I said, if we did I am of the opinion he wouldn't have done it because Mr. Touro is a man that doesn't believe in what he calls wasted effort.

Q. Did you feel at that time or you recall – this is six years ago, do you feel it would have been a wasted effort to file such a motion at that time?

A. Like I told you, I wasn't in the case at the outset, I was representing a co-defendant by the name of Jerry Anderson. It was only – I would say some several months before the trial that Mr. Touro asked me to come into the Francis case. Mr. Touro had been his attorney I would say maybe some four or five months before I came into the case. When you come into a case like that sort of haphazard things that have been done, you don't question them and apparently I didn't.

Q. Were you aware that any attacks on the make-up of the Grand Jury and Petit Juries or Orleans Parish were being made at that time through the Labat and Merrit case?

A. I knew they were being made and I made it in quite a few cases myself.

* * *

Q. Would you state again, if you have already stated the reason why you didn't make that attack?

A. On the jury?

Q. Yes.

A. One thing I came into the case kind of late, I came in as a trial expert to help Mr. Touro to select juries and whatnot. Things done previous thereto was Mr. Touro's business. I did tell him I thought he ought to have a Bill of Particulars and Prayer for Oyer and he did that. I can't question what he did four or five months before I came in as a trial expert and that's my job.

App. 26-27.

Francis had not been informed that his attorneys did not attack the Grand Jury system. At that time, he was not even aware of the availability of such an attack. App. 61.

Upon that record, the trial judge denied the petition saying:

> . . .it is the finding of this Court that the Defendant was represented by competent counsel; that he knew of his right to appeal but chose, upon advice of his attorneys and parents, not to do so, as corroborated by his statement in open court at the time of his sentencing; that the attack on the Grand Jury Venire was considered by his attorneys who chose not to make such an attack; and, is now prescribed [sic].
>
> App. 78.

Thereafter the Louisiana Supreme Court rejected Francis' combined petition for writ of certiorari and petition for writ of habeas corpus. App. 79.

C. The Federal Habeas Corpus Proceeding.

On March 3, 1972, Francis filed his *pro se* petition for writ of habeas corpus in the United States District Court for the Eastern District of Louisiana. App. 1. Counsel was appointed for him. The state responded and filed the complete record of the state court trial and habeas proceedings. App. 5. An evidentiary hearing was held before a magistrate, but not transcribed and thus not relied upon by the district court. A magistrate's hearing in two other cases which examined the jury selection practices in Orleans Parish was utilized by the district court. The evidence adduced at that hearing established that from 1943 until August 15, 1966, the Orleans Parish Jury Commission intentionally and systematically excluded people who were paid by the hour and lost their wages if called for jury duty. App. 81.

The practice ended on August 15, 1966 when the Fifth Circuit, *en banc*, found in *Labat v. Bennett*, 365 F.2d 698:

> (A) The exclusion of daily wage earners as a class violates the petitioner's due process and equal protection rights to an impartial jury representing a cross-section of the community. (B) The exclusion of this large class, 47 percent of all Negro workers in Orleans Parish, as the district judge found, discriminates against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of

> Negroes. (C) Contrary to the district court's holding there is no Louisiana statutory authority permitting jury selection officials to exempt daily wage earners as a class.
>
> *Id.*, 365 F.2d at 719-720, *cert. den.* 386 U.S. 991 (1967).
>
> (App. 91-92, quoted in opinion of the district court).

Referring to the information and statistics in the Magistrate's report and the Fifth Circuit decision in *Labat*, the district court held: "...the conclusion that the grand jury [which indicted Francis] was defective is inescapable." App. 91.[4]

[4]In the Fifth Circuit the State's Brief (pp. 7-16) argued that Francis and Henderson (a consolidated appellee) were estopped from challenging grand jury selection practices because the Louisiana Supreme Court had held, upon an extensive record, that the 1962 Orleans Parish Grand Jury had been properly selected. *State v. Barksdale*, 170 So.2d 374 (1964). Therefore, the state argued, the *Barksdale* record and holding were presumed to be correct in the absence of a showing of inadequacy under 28 U.S.C. §2254(d).

Francis is, of course, not estopped by the *Barksdale* record. He was indicted in 1964. He was not a party to the *Barksdale* record, as §2254(d) required. He was not even a party to the magistrate's hearing in Henderson which was referred to by the district judge. But the state was a party to that hearing and although it may have been violative of *Wingo v. Wedding*, 418 U.S. 461 (1971), the state never raised the propriety of the magistrate's hearing on appeal. Consequently, it is foreclosed from attacking that proceeding now. Therefore the finding that the grand jury which indicted Francis was defective must now be considered factually established.

Louisiana law stated:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against an array or venire must be filed, pleaded, heard or argued before the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be argued or heard.[5]

The court, relying upon the factual record developed at the state habeas proceeding, found that Francis had not intentionally relinquished, abandoned or waived his right to object to the grand jury's composition, and held that federal habeas was still open to him under *Fay v. Noia*, 372 U.S. 391 (1963) and *Johnson v. Zerbst*, 304 U.S. 458 (1938).[6]

[5]The relevant statute was LSA-R.S. 15:202. It was repealed and replaced in 1967 by L.S.A. C. Cr. P. Art. 535 which permits a grand jury challenge until 3 days before trial, or with permission of the court, at any time before commencement of the trial.

[6]The term of the grand jury which indicted Francis expired on March 1, 1965. (See Francis' Fifth Circuit Brief p. 6, n. 7 and *Michel v. Louisiana*, 350 U.S. 91, 93 (1955) which reflect that the September term of an Orleans Parish grand jury expires after 6 months, or on March 1 of the following year.) Therefore Francis, who was indicted on December 10, 1964, would have had to make his objection by March 4, 1965. Counsel was appointed for him on February 9, 1965. App. 12. He had been arraigned on December 16, 1964, pled "not guilty" and was given "15 days for pleadings" App. 9, although he obviously had no lawyer. The tardy appointment of counsel was under the then applicable provision of LSA R.S. 15:143 which said:

> Whenever an accused charged with a felony shall make affidavit that he is unable to procure or employ counsel

The district court distinguished *Davis v. United States*, 411 U.S. 233 (1973) but alternatively found, if *Davis* were applicable, that Francis had shown "cause" which entitled him to federal habeas relief. App. 91. The cause was the inepteness of Francis' counsel. App. 91.[7]

Having found that the grand jury which indicted Francis was unconstitutionally composed and that Francis was entitled to federal habeas corpus relief, the court set aside the conviction and ordered a new indictment and trial for Francis. App. 93.[8]

The State of Louisiana appealed to the Fifth Circuit.

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learned in the law, the court before whom he shall be tried, or some judge thereof, shall immediately assign to him such counsel.

Of course, the key to the finding of no waiver was the utter failure of Francis' counsel after his appointment. Francis never had knowledge of the jury challenge right. App. 61.

[7]The Fifth Circuit put the district court's finding of "cause" this way:

> The factual basis for the court's finding was that Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the time for challenging the indictment to pass without objecting to the grand jury's composition.
>
> *Newman and Francis v. Henderson*, 496 F.2d 896, 897 (5th Cir. 1974).
> App. 97.

[8]The district court also held that Francis did not waive his right to appeal and awarded him an out of time appeal in state court. App. 90. The state did not contest that finding in their appeal to the Fifth Circuit. However, an out of time appeal would be superfluous, since if the district court was correct in granting habeas relief to Francis, all of the proceedings which followed the original invalid indictment fall and he would be entitled to a new indictment free from constitutional defects, and a new trial on the indictment.

D. The Fifth Circuit Decision.

Until this court's decision in *Davis v. United States*, 411 U.S. 233 (1973), the Fifth Circuit adhered to the knowing, intelligent waiver standards of *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Fay v. Noia*, 372 U.S. 391 (1963) in deciding grand jury collateral attacks brought by state petitioners who had not timely raised their claims in state courts. *Labat v. Bennett*, 365 F.2d 698,707-711 (5th Cir. *en banc* 1966); *Winters v. Cook*, 489 F.2d 174 (5th Cir. *en banc* 1970).

After the decision in *Davis* the Fifth Circuit applied its reasoning to state prisoners seeking federal habeas corpus relief and held that they too would be barred from collaterally attacking an indictment unless a timely pretrial objection had been made or unless "cause" was shown to excuse the operation of the waiver provision.[9]

In Francis' case, the Fifth Circuit imposed a harsher rule. Because the Louisiana waiver provision was absolute and contained no "cause shown" escape clause, the court engrafted an "actual prejudice" exception on the statute. The court held that Francis' non-compliance with the state procedural requirements would be excused only if he could demonstrate "actual prejudice." Since the district court judgment did not deal with prejudice, it was vacated and the case remanded "to permit a determination of whether the facts presented by Francis constitute a showing of prejudice." 496 F.2d at 899, App. 100.

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[9]*Jones v. Henderson*, 494 F.2d 47 (5th Cir. 1974); *Marlin v. Florida*, 489 F.2d 702 (5th Cir. 1974); *Rivera v. Wainwright*, 488 F.2d 275, (5th Cir. 1974).

Francis' Petition for Rehearing and Rehearing *en banc* was denied. 502 F.2d 1167. His Petition for Writ of Certiorari was granted by this Court on April 28, 1975.

SUMMARY OF ARGUMENT

I. *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Fay v. Noia*, 372 U.S. 391 (1963) established that a convicted state prisoner is entitled to be heard in a federal habeas corpus action unless he knowingly and intelligently waived his constitutional rights in state court or unless he deliberately by-passed his state court remedies. The Court has reaffirmed those principles in many cases, most recently doing so in *Lefkowitz v. Newsome*, ____ U.S. ____, 95 S.Ct. 886, 43 L.Ed.2d 196 (February 19, 1975).

While the Court has not explicitly applied the *Johnson - Fay* test to grand jury discrimination challenges which were not preserved in the state proceedings, it has applied it to combined grand and petit jury challenges which were tardy without drawing any distinction between the two. *Peters v. Kiff*, 407 U.S. 493, 494 n. 1 (1972). *Whitus v. Balkcom*, 370 U.S. 728 (1962), discussed in *Whitus v. Georgia*, 384 U.S. 545, 547-548 (1967). The Circuit Courts of Appeals have applied the *Johnson-Fay* test to grand jury challenges. *Labat v. Bennett*, 365 F.2d 698 (5th Cir. *en banc* 1965); *McNeil v. North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Henderson v. Tollett*, 459 F.2d 237 (6th Cir. 1972), rev'd on other grounds, *Tollett v. Henderson*, 411 U.S. 233 (1973); *Wade v. Yeager*, 377 F.2d 841 (3rd Cir. 1967).

The *Johnson - Fay* test was not foreclosed in grand jury challenge cases by *Davis v. United States*, 411 U.S. 233 (1973). *Davis* is limited to federal prisoners whose federal habeas corpus rights were limited by congressional adoption of the specific waiver doctrine contained in Rule 12(b)(2), Fed. R. Crim. Proc. Since Congress did not similarly preclude state prisoners, no analogous argument can be made to preclude those petitioners.

On the contrary, the historical importance of the writ, the policy that constitutional rights should not be denied "without the fullest opportunity for plenary federal judicial review", the concerns over the availability of state remedies to guarantee those rights and the "institutional constraints" on this Court's certiorari jurisdiction are compelling reasons for according state petitioners access to federal habeas corpus under the *Johnson - Fay* standards. *Fay v. Noia, supra* and *Kaufman v. United States*, 394 U.S. 217 (1969).

Those reasons are strengthened by the longstanding failure of some states to follow the law barring discrimination in grand jury selection. Since 1880 in *Strauder v. West Virginia*, 100 U.S. 303, the Court has had to contend with a constant stream of cases which involved deficient grand jury selection methods. The availability of federal habeas corpus, under the *Johnson - Fay* standard, has been an important factor in correcting grand jury racial discrimination. There is no cause to now adopt a standard which would make it more difficult to assert and protect constitutional rights guaranteed for nearly a century.

Under the *Johnson - Fay* test the petitioner is entitled to relief. It is undisputed that he did not know of the availability of such a challenge nor did he or his

lawyer fail to make it for any strategic or tactical reason.

II. Even if *Davis v. United States*, 411 U.S. 233 (1973) provides the standard for relief from waiver, the test is "cause" and not "actual prejudice." *Davis* and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963) looked to prejudice only after it was clear that no "cause" was shown. The Fifth Circuit sees the two matters as separate ones, but applied an "actual prejudice" test to petitioner Francis because Louisiana's forfeiture statute was absolute.

In doing so it created a harsher test for state prisoners than that required of federal prisoners. Since Louisiana's interest in compelling a timely grand jury challenge motion is the same as the federal government's, there is no reason to impose a more stringent standard to state petitioners seeking federal habeas corpus, especially since "waiver affecting federal rights is a federal question", *Fay v. Noia*, 372 U.S. at 439. To accord a federal prisoner easier access than a state prisoner is completely inconsistent with this history of the writ and its intended availability to preserve the constitutional rights of state defendants.

The incompetenteness of Francis' appointed counsel, measured by his not having handled a criminal matter in many years, his filing motions only the day before the trial, and his failure to preserve his client's right to appeal is sufficient "cause" to excuse the failure to make a timely challenge.

III. If the test to be applied is one of "actual prejudice", Francis has made a prima facie showing and on the remand ordered by the Fifth Circuit, the burden should be upon the state to show that there was no prejudice.

The crime had racial overtones. The decision to charge was made by the district attorney and involved the first time in the recollected history of Orleans Parish that a person was indicted for felony murder where the deceased was a co-perpetrator. The trial court appointed inexperienced counsel and tolerated conduct which was inconsistent with the precepts of *Powell v. Alabama*, 287 U.S. 45 (1932) requiring "effective aid" of counsel. The failure to create a record on appeal makes it impossible to assume that Francis had a fair trial. Thus, the totality of the circumstances of this case constitute a prima facie showing of prejudice which the state must rebut in order to foreclose relief, even under the harshest application of *Davis*.

ARGUMENT

I.

JOHNSON V. ZERBST, 304 U.S. 458 (1938) AND *FAY V. NOIA*, 372 U.S. 391 (1963) PROVIDE THE PROPER STANDARD FOR DETERMINING WAIVER AND THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF FOR A CONVICTED STATE PRISONER WHO DID NOT COMPLY WITH STATE PROCEDURAL RULES FOR CHALLENGING THE COMPOSITION OF THE GRAND JURY WHICH INDICTED HIM.

The Writ of Habeas Corpus is a sacred part of our heritage:

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined

with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

Fay v. Noia, 372 U.S. 391, 401-402 (1963).

When a state proceeds by indictment, as Louisiana was required to do in charging Francis with murder, LSA Const. Art. I, §9, the right to be indicted by a constitutionally composed grand jury is a fundamental right. It is guaranteed by the Equal Protection Clause and supported by nearly a century of this Court's decisions:

> For over 90 years, it has been established that a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881). Although a defendant has no right to demand that members of his race be included on the grand jury that indicts him, *Virginia v. Rives*, 100 U.S. 313 (1880), he is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice. *Ex parte Virginia*, 100 U.S. 339 (1880); *Gibson v. Missis-*

> *sippi*, 162 U.S. 565 (1896). Cf. *Hernandez v. Texas*, 347 U.S. 475 (1954).
>
> *Alexander v. Louisiana*, 405 U.S. 625, 628-629 (1972) (footnote omitted).

Only if Abraham Francis has somehow waived that right can he be precluded from vindicating it via federal habeas corpus.

A. The Standards for Determining Waiver of Constitutional Rights.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Courts should "indulge every reasonable presumption against waiver", *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and they should "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937). The failure of a state court defendant to actively assert a fundamental constitutional right cannot be deemed a waiver: "Presuming waiver from a silent record is impermissible." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

These doctrines were recently reaffirmed in *Barker v. Wingo*, 407 U.S. 514, 525-526 (1972). There the Court placed some responsibility upon a defendant to assert a speedy trial claim, but cautioned:

> . . . we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. Such

cases have involved rights which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self incrimination, and to have the assistance of counsel.

Id. 407 U.S. at 529.

While the enumerated rights in *Barker* do not mention grand jury challenges, the listing is clearly not an exclusive one. Nor have this Court's decisions applying the historical waiver standards to state prisoners seeking federal habeas corpus relief limited their effect to only certain constitutional rights.

B. *Fay v. Noia*, 372 U.S. 391 (1963) Established That The *Johnson v. Zerbst* Standard Is The Applicable Test for Determining if a State Prisoner Has Waived His Federal Claims for Federal Habeas Corpus Purposes.

In *Fay v. Noia*, the Court concluded that only if a state prisoner deliberately by-passed the orderly procedure of the state courts would he forfeit his right to assert his constitutional claim in federal habeas proceedings. The test for determining deliberate by-pass was clear:

> The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 'an intentional relinquishment or abandonment of a known right or privilege' – furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other

> reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits – though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price v. Johnston*, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.

Id. 372 U.S. at 438-439.

The vitality of *Fay* is confirmed by many decisions of this Court. See, *Jackson v. Denno*, 378 U.S. 368, 370 n. 1 (1964); *Henry v. Mississippi*, 379 U.S. 443, 452-453 (1964); *Humphrey v. Cady*, 405 U.S. 504, 516-517 (1972); *Barker v. Wingo*, 407 U.S. 514, 525-526, 529 (1972); *Murch v. Moltram*, 409 U.S. 41 (1972). More recently in *Lefkowitz v. Newsome*, ____ U.S. ____, 95 S.Ct. 886, 43 L.Ed.2d 196 (February 19, 1975), the Court noted:

> . . . even when state procedural grounds are adequate to bar direct review of a conviction in this Court, federal habeas corpus relief is nonetheless available to litigate the defendant's constitutional claims unless there has been a deliberate by-pass of the state procedures. See *Fay v. Noia*, 372 U.S. 391, 428-431.

Id. 43 L.Ed.2d at 202 n. 6.[10]

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[10]Three dissenting Justices in *Lefkowitz* agreed that "federal issues are 'preserved' for habeas corpus purposes unless state procedures for litigating them have been 'deliberately by-passed.' 43 L.Ed.2d at 206. But Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist believed that a guilty plea foreclosed collateral relief, even though New York permitted an

While this Court has not explicitly applied the *Johnson v. Zerbst* waiver test to a grand jury discrimination challenge, it has applied it to combined grand and petit jury challenges in several situations. In *Peters v. Kiff*, 407 U.S. 493, 494 n. 1 (1972) the Court considered the federal habeas corpus claims of a state defendant who had not made timely state challenges. In *Whitus v. Balkcom*, 370 U.S. 728 (1962) the Court vacated a decision of the Fifth Circuit which affirmed a district court dismissal of Whitus' habeas corpus petition in which he, for the first time, attacked the composition of the grand and petit juries. See the discussion in *Whitus v. Georgia*, 385 U.S. 545, 547–548 (1967).

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appeal of the constitutional issues Lefkowitz sought to raise notwithstanding his guilty plea. Justice White pointed out that in *Tollett v. Henderson*, 411 U.S. 258 (1973) the Court precluded a state prisoner who pled guilty from challenging his indictment in a federal habeas corpus petition, viewing the guilty plea as a "break in the chain" which bars him from raising "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 43 L.Ed.2d at 205. Justice White contended that the *Tollett* principles applied equally to Lefkowitz.

Tollett, decided along with *Davis v. United States*, 411 U.S. 233 (1973) noted that it "left open" the issue posited in this case by Mr. Francis. *Tollett*, 411 U.S. at 260 n. 1. However, *Tollett* did agree that:

> If the issue [in the case] were to be cast solely in terms of 'waiver', the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here.
>
> 411 U.S. at 266.

We submit that the issue for a state defendant seeking to raise grand jury exclusion on federal habeas after a plea of not guilty and trial by jury is one of "waiver" under the *Johnson v. Zerbst* standards applied by the Sixth Circuit in *Tollett*.

Prior to the decision in *Davis v. United States*, the Circuit Courts of Appeals which faced the grand jury challenge issue ruled that the *Johnson - Fay* rationale provided the controlling standard.[11] We believe that those holdings were correct. But first *Davis v. United States* must be assessed.

C. *Davis v. United States*, 411 U.S. 233 (1973) Applies Only to Federal Defendants Who Failed to Comply with Rule 12(b)(2) of The Federal Rules of Criminal Procedure and Later Seek Post Conviction Relief Under 28 U.S.C. §2255.

In *Davis*, the Court held that the express waiver provisions of Rule 12(b)(2) of the Federal Rules of Criminal Procedure acted as a limitation on federal habeas review (28 U.S.C. §2255) of a defendant's claim that his indictment was invalid because of racial exclusions in the grand jury selection process. The Court came to that conclusion because:

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nevertheless intended to perversely negate the Rule's purpose by permitting an

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[11] *Labat v. Bennett*, 365 F.2d 698 (5th Cir., *en banc*, 1965); *Winters v. Cook*, 489 F.2d 174 (5th Cir. *en banc*, 1973); *McNeil v. North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Henderson v. Tollett*, 459 F.2d 237 (6th Cir. 1972), rev'd on other grounds, *Tollett v. Henderson*, 411 U.S. 233 (1973); *Wade v. Yeager*, 377 F.2d 841 (3rd Cir. 1967).

entirely different but much more liberal requirement of waiver in federal habeas proceedings.

Id. 411 U.S. at 242.

The Court made it clear that its rejection of the *Kaufman v. United States,* 394 U.S. 217 (1969) knowing and deliberate by-pass waiver standard was due to the existence of 12(b)(2). In *Kaufman* ". . . Congress did not deal with the question of waiver in the federal habeas statute . . . and this Court held that since the federal statute had not spoken on the subject of waiver with respect to claims of unlawful search and seizure, a particular doctrine of waiver would be applied by this Court in interpreting the statute." *Davis,* 411 U.S. at 242.

Thus, it is apparent that where Congress has not established a specific waiver doctrine, this Court is free to decide the appropriate standards for access to federal habeas corpus relief. In the federal habeas statute for state prisoners (28 U.S.C. §2254) Congress precluded only those who had not exhausted state remedies and *Fay v. Noia* rejected any more preclusive theory. 372 U.S. at 434-435. No reason exists to adopt a more stringent standard for state prisoners making grand jury challenges in federal habeas proceedings.

D. The *Johnson* - *Fay* Standard is the Proper Test to be Applied to State Defendants Raising The Question of Racial Exclusion in the Selection of a Grand Jury in Federal Habeas Corpus Proceedings.

Louisiana argues that "the waiver principle of *Davis* should apply equally to the several states." Response to

Petition for Writ of Certiorari, p. 3. But different considerations come into play when federal habeas corpus is invoked by a state prisoner and to accept Louisiana's invitation would be to reject the important historical role of federal habeas, especially in the area of grand jury racial exclusions.

The Court has accepted the principle that 'There is undoubtedly a difference in the way federal courts should treat post conviction applications by state and federal prisoners.' *Kaufman v. United States,* 394 U.S. 217, 230 (1969). The will being carried out is that of Congress:

> Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.
>
> *Fay v. Noia,* 372 U.S. at 426-427.

That policy is "that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay v. Noia,* 372 U.S. at 424. A federal defendant, like *Davis,* has already had such a right. The importance of providing it to state defendants is based upon:

> . . . the inadequacy of state procedures to waive and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights [and] the institutional constraints on the exercise of this Court's certiorari jurisdiction . . .

Kaufman v. United States, 394 U.S. at 225-226.

In addition, this Court's supervisory powers over the administration of criminal justice in the federal courts offers an added degree of protection to federal defendants' constitutional rights. See, *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946); *Ballard v. United States*, 329 U.S. 187, 192 (1946); *McNabb v. United States*, 318 U.S. 332 (1943).[12]

These considerations led the Fifth Circuit, prior to the *Davis* decision, to conclude that there could be different standards for federal and state prisoners making similar post conviction collateral attacks on grand jury indictments. Thus 12(b)(2) was applied to federal petitioners under §2255 and the *Johnson - Fay* test to state petitioners under §2254. Compare, *Davis v. United States*, 455 F.2d 919, aff'd, 411 U.S. 233 (1973) with *Labat v. Bennett*, 365 F.2d 698, 707-711 (1965).

The need for federal courts to "have the last say with respect to questions of federal law" (*Kaufman*, 394 U.S. at 225) relating to grand jury discrimination is especially strong. It may be that the waiver policy of 12(b)(2) applied in *Davis* is not unreasonable considering the rareness of successful federal jury challenges.[13]

[12]It is doubtful that in the federal court system a lawyer who had not tried a capital case in fifteen years would be appointed to represent a teenaged defendant on trial for his life. Nor would a motion to suppress be denied without a hearing, and the right to appeal treated so cavalierly. The facts of this case underscores the concerns voiced in *Fay* and accepted in *Kaufman*.

[13]*Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Ballard v. United States*, 329 U.S. 187 (1946); *Glasser v. United States*, 315 U.S. 60 (1940).

The adoption of the 1968 Jury Selection Act, 28 U.S.C. §1861 et seq. insures the integrity of future federal grand jury selection methods.

But state grand jury discrimination claims based upon the exclusion of Negroes are another matter. Since 1880 such discrimination has been unconstitutional. *Strauder v. West Virginia*, 100 U.S. 303. The right to a non-exclusionary grand jury predates by fifty years the extension of the Sixth Amendment right to counsel to state defendants. *Powell v. Alabama*, 287 U.S. 45, (1932). It predates by eighty-one years the extension of the Fourth Amendment to a state prisoner. *Mapp v. Ohio*, 367 U.S. 643 (1961). (Yet failure to timely preserve those rights does not foreclose federal habeas absent a showing of knowing and intelligent waiver.) The public policy reasons for protecting against racial discrimination in jury selection are so strong that Congress, in 1875, made it a crime for state (and federal) officials to exclude persons from grand or petit jury service because of race. 18 Stat. 336, as amended 18 U.S.C. §243.

Nevertheless, since 1880, claims of racial discrimination in state grand jury selection methods have constantly occupied the Court and have almost always resulted in the Court declaring unconstitutional the selection methods utilized in a handful of states.[14] The ongoing need to correct deficient grand jury selection

[14]The Court held that exclusion of Negroes from grand juries was unconstitutional in: *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85 (1955); *Cassell v. Texas*, 339 U.S. 282 (1950); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Rogers v. Alabama*,

methods reflects an insensitivity by certain states to the importance of constitutional precepts in selecting grand juries.

The Fifth Circuit, more than any other, has had to contend with claims of grand jury discrimination. That Court, until *Davis,* hued to the *Johnson - Fay* test in assessing the petitions of state prisoners who had not made timely state challenges.[15] Indeed, the Fifth Circuit, recognizing the facts of jury challenge life in its jurisdiction "consistently [took] a jaundiced view of waiver in habeas proceedings in which the state has relied on the petitioner's failure to make a timely objection to the exclusion of Negroes from juries." *Labat v. Bennett,* 365 F.2d at 708 n. 14.

Access to federal habeas corpus relief has been a prime factor motivating states to remedy deficient

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192 U.S. 226 (1904); *Carter v. Texas,* 177 U.S. 442 (1900); *Bush v. Kentucky,* 107 U.S. 110 (1883).

In the following cases the Court condemned exclusion of Negroes in grand and petit juries: *Sims v. Georgia,* 389 U.S. 404 (1967); *Jones v. Georgia,* 389 U.S. 24 (1967); *Whitus v. Georgia,* 385 U.S. 545 (1967); *Coleman v. Alabama,* 377 U.S. 129 (1964); *Patton v. Mississippi,* 332 U.S. 463 (1947); *Hale v. Kentucky,* 303 U.S. 613 (1938); *Norris v. Alabama,* 294 U.S. 587 (1935); *Martin v. Texas,* 200 U.S. 316 (1906); *Neal v. Delaware,* 103 U.S. 370 (1881); *Strauder v. West Virginia,* 100 U.S. 303 (1880).

[15] *Labat v. Bennett,* 365 F.2d 698, 707-711 (1966) (*en banc*); *Cobb v. Balkcom,* 339 F.2d 95 (5th Cir. 1964); *Whitus v. Balkcom,* 333 F.2d 496 (5th Cir. 1964); *Whippler v. Balkcom,* 342 F.2d 388 (5th Cir. 1965); *State of Louisiana v. Newton,* 343 F.2d 161 (5th Cir. 1965) (affirming, per curiam, *In re: Newton,* 224 F.Supp. 330 (W.D. La. 1963); *Peters v. Kiff,* 441 F.2d 371 (5th Cir. 1971), rev'd on other grounds, *Peters v. Kiff,* 407 U.S. 493 (1972); *Davis v. Smith,* 430 F.2d 1256 (5th Cir. 1970); *Winters v. Cook,* 489 F.2d 174 (5th Cir. 1973) (*en banc*).

grand and petit jury selection practices. The Court was correct when it said:

> The availability of post conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. . . . Thus, collateral relief . . . contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact finding process.
>
> *Kaufman v. United States,* 394 U.S. 217, 229 (1969).

Thus, a Mississippi author, spurred by federal habeas and state court cases, urged the adoption of new selection methods to remedy racial discrimination in grand and petit juries. Corlew, "Mississippi Jury Selection: A Proposed Statute," 40 Miss. L.J. 393 (1964). And in *Whitus v. Balkcom,* 370 U.S. 728 (1962) the Court, by breathing life into Whitus' out of time grand and petit jury challenge made in a federal habeas corpus petition, set in motion a chain of events which ultimately led to Georgia enacting a jury selection statute patterned on the federal statute, after the state's procedures were found deficient in *Whitus v. Georgia,* 385 U.S. 545 (1967). *Jury Discrimination in the South: A Remedy?* 8 Colum. J. of Law and Soc. Prob. 589, 612 n. 155 (1972). As that Note points out however, no panacea has been found to cure discrimination in the grand and petit jury systems and the promises of *Strauder* are still unfulfilled in many jurisdictions.[16]

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[16] The author lists over 70 affirmative suits brought under 42 U.S.C. §1983 since 1966 to remedy jury discrimination. *Ibid,* 621-622. Forty of the suits were won by plaintiffs. *Id.* 617-618.

But since the nineteen-sixties, the *Johnson - Fay* test has served an important role by providing relief for black defendants who have been indicted by unconstitutionally selected grand juries. The test not only vindicated their constitutional rights, it prompted state and local compliance with longstanding constitutional jury guarantees and made defense lawyers aware of their obligation to protect those rights. Every participant in the criminal justice process was put on notice that ninety years of law was not to be taken lightly.

There is no reason to terminate that vigilance. The *Johnson - Fay* standards protect against federal habeas review where there has been a willfull withholding of a grand jury challenge by a defendant who deliberately seeks "to subvert or evade the orderly adjudication of his federal defenses in state courts." *Fay v. Noia*, 372 U.S. at 433. Absent such a by-pass, the historical considerations are paramount. The right of a state prisoner to have plenary federal review of his federal constitutional rights; the absence of any Congressional waiver provision in 2254; the fact that the right involved has been established for nearly a century and has been disregarded so often by the states, are all compelling factors which call for the application of the *Johnson - Fay* test to state defendants challenging grand jury discrimination on federal habeas corpus.

E. Under the *Johnson - Fay* Standard, The Petitioner is Entitled to Relief.

The District Court found that there had been no knowing and intelligent waiver by Francis of his right to challenge the grand jury which indicted him. The finding was not challenged by the state on appeal and

the Fifth Circuit did not disturb it. The District Court's conclusion is supported by overwhelming evidence.

Francis was not told by anyone of his right to attack either the grand or petit juries. App. 61. Amadee did not recall discussing a jury challenge with Tureaud App. 26, but stated, "if we did I am of the opinion he wouldn't have done it because Mr. Tureaud is a man that doesn't believe in what he calls wasted effort." App. 26. In response to the question of whether he thought such a motion would have been a wasted effort, Amadee replied:

> A. Like I told you, I wasn't in the case at the outset, I was representing a co-defendant by the name of Jerry Anderson. It was only – I would say some several months before the trial that Mr. Touro asked me to come into the Francis case. Mr. Touro had been his attorney I would say maybe some four or five months before I came into the case. When you come into a case like that sort of haphazard things have been done, you don't question them and apparently I didn't.
>
> Q. Were you aware that any attacks on the makeup of the grand jury and petit juries of Orleans Parish were being made at that time through the Labat and Merritt case?
>
> A. I knew they were being made and I made it in quite a few cases myself.
>
> App. 26.

Nevertheless, no attack was made. Certainly no strategic or tactical reason existed for not making the challenge. Francis was not pleading guilty, he was forced to go to trial for his life. Contesting the validity of his indictment would not have placed him in greater jeopardy. No trial advantage could be gained by

withholding the grand jury claim. The only conclusion is the one reached below: Francis did not knowingly and intelligently waive his right to challenge the grand jury. Nor is there any satisfactory explanation for his lawyer's failure to do it. (The record is silent on the issue of whether Tureaud was actually aware of the availability of such a challenge.) Under any application of the *Johnson - Fay* standards, Francis would be entitled to federal habeas corpus relief.

II.

EVEN IF *DAVIS V. UNITED STATES*, 411 U.S. 223 (1973) PROVIDES THE STANDARD BY WHICH TO JUDGE THE AVAILABILITY OF FEDERAL HABEAS CORPUS RELIEF, THE TEST IS ONE OF "CAUSE" NOT "ACTUAL PREJUDICE". SINCE FRANCIS SHOWED "CAUSE", HE IS ENTITLED TO RELIEF.

Davis applied the test of F.R. Crim. P. 12(b)(2) to a collateral attack upon a grand jury's composition. That rule provides, *inter alia*, that an alleged defect in an indictment must be raised before trial and failure "constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver." The Court relied upon *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), which similarly involved the 12(b)(2) waiver-cause principle, albeit in a situation involving a belatedly filed motion in the original proceedings.

In both cases, the Court found that the tardy defendants had not shown cause. Davis had extremely

competent appointed counsel.[17] The *Shotwell* defendants also had able counsel, who twice represented them before this Court.[18] In both cases the facts of the grand jury selection methods were open and known.

Having found no cause the Court considered the absence of prejudice as totally foreclosing any relief from the waiver provisions in both *Davis* and *Shotwell*.

Thus, the test of *Davis* and *Shotwell* is that failing to show "cause", and absent "prejudice" a 12(b)(2) forfeiture cannot be revived. But if cause is shown, prejudice need not be.

Davis and *Shotwell* do not make this distinction as neatly as we do because the lack of cause alone was apparent in each case and the Court therefore moved directly into the prejudice discussion. As we point out below, the Fifth Circuit has seen the components as separate ones and 12(b)(2) does not speak at all of prejudice. While we comprehend the distinction between the presumption of prejudice in a pre-trial motion and the need to show it in a post-trial one, *Davis*, 411 U.S. at 245, that does not mean that prejudice becomes the *sine qua non* for proving "cause." If that were so, 12(b)(2) would have been effectively rewritten by *Davis*.

The Fifth Circuit views cause as a matter which need not include prejudice. In state petitioner cases, where the state rule affords relief if "cause" is shown, then that aspect of *Davis* is applied. *Van Eaton v. Wainwright*, 508 F.2d 849 (5th Cir. 1975). But here, because Louisiana creates an airtight system of

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[17] 411 U.S. at 234, n. 1.

[18] *United States v. Shotwell Mfg. Co.*, 355 U.S. 233 (1957); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963).

forfeitures, the Fifth Circuit requires a showing of "actual prejudice", not merely "cause" as a pre-condition for affording relief. *Francis v. Henderson*, 496 F.2d at 896, 899.[19]

Thus, a state prisoner, seeking relief from an alleged waiver of his federal constitutional rights, is subjected to a harsher relief from waiver standard than a federal prisoner. That cannot be.

A. The Standards for Collateral Review for A State Defendant Cannot be Harsher than those Required of a Federal Defendant.

While it is true that Louisiana can create a system of absolute forfeitures of federal constitutional rights which will govern its review of untimely claims, *Michel v. Louisiana*, 350 U.S. 91 (1953) it is equally true that:

> . . . a state court's finding of waiver [does not] bar independent determination of the question by the federal courts, for waiver affecting federal rights is a federal question. E.g., *Rice v. Olsen*, 324 U.S. 786.

Fay v. Noia, 372 U.S. at 439.

Obviously the Court below agreed and found it necessary to engraft some relief into the Louisiana

[19]See also *DuMont v. Estelle*, ____ F.2d ____ (5th Cir. May 30, 1975), where a Fifth Circuit panel applied the "actual prejudice" test to the Texas waiver rule which makes no allowance for "cause", citing *Newman and Francis v. Henderson*. However, the day before, another Fifth Circuit panel remanded a Texas case for a determination of waiver citing *Fay v. Noia* and *Van Eaton v. Wainwright, supra*. *Eggleston v. Estelle*, ____ F.2d ____ (5th Cir. May 29, 1975).

forfeiture provision. Our quarrel is with the grafted standard.

Louisiana's interest in requiring timely pre-trial indictment motions is no greater than the interest 12(b)(2) seeks to protect. It is the interest in having defendants make their grand jury challenges prior to trial so errors can be corrected then, instead of delaying in the hope that "the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." *Davis*, 411 U.S. at 241.[20] The state has conceded that its concerns are not different from the federal government's. Contending that the district court erred in not using the *Davis* standard, Louisiana wrote: "Unless a distinction is based upon differing policy reasons behind the federal and state rules, it [the district court decision] should not stand. As stated before, the federal and state policy coincide on this point." Brief of State of Louisiana in the Fifth Circuit, p. 6.

Since Louisiana's interests are no greater than the federal ones, no reason exists which justifies the imposition of a harsher relief from waiver standard upon a state prisoner than upon a federal prisoner. To do so would give greater preclusive effect to procedural defaults by state defendants than to similar defaults by federal defendants. That would be an ironic twist to *Kaufman v. United States*, 394 U.S. 217 (1969). There, the Court refused to indulge the government's argument that a federal prisoner's access to federal collateral remedies should be more limited than a state prisoner's access.

[20]As we have pointed out, such a deliberate delay would preclude relief even under *Fay*. Compare Mr. Justice Marshall's dissent in *Davis*, 411 U.S. at 249-252.

> There is no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.

Id. 394 U.S. at 228.

As we have argued above, there are reasons which justify a more restrictive waiver rule for federal defendants making an out of time collateral attack on a grand jury indictment. At the least, a state defendant's access to federal habeas relief should not be made more difficult than a federal petitioner's. "Cause", not "actual prejudice" can be the most stringent test imposed upon a state petitioner.[21]

B. Abraham Francis Has Shown "Cause" Which Entitles Him to Relief.

The district court, after deciding that there was no waiver, assumed for argument purposes that the *Davis* "cause" standard applied, and decided that good cause did exist. App. 91. The Fifth Circuit took no issue with the finding and its basis. "Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the

[21] An "actual prejudice" test under the Louisiana scheme is singularly inappropriate. Because the rule required the challenge to be made within three days after the end of the grand jury term, a defendant could make a pre-trial challenge but still be barred because it was made beyond the three day limit. If that defendant then had to show prejudice to obtain relief, the presumption of prejudice which exists pre-trial would be nullified although no state interest could have been harmed because a new pre-trial indictment could be returned. That underscores the unrealistic harshness of the "prejudice" test as applied to the then applicable Louisiana practices.

time for challenging the indictment to pass without objecting to the grand jury's composition." App. 97; 496 F.2d at 897-898.

There is no doubt about the correctness of the assessment of Francis' lawyer. If anything, it was charitable. Tureaud had not handled a murder case "in about fifteen years." App. 23. Although appointed on February 9, 1965, he did not file his first motion until the day before trial, June 23, 1965 and that, on a form borrowed from the district attorney, sought a continuance App. 13. Because he was so unfamiliar with criminal practice he associated another lawyer, Mr. Amadee, as a "trial expert" App. 27. The two lawyers met with Francis 'two or three times" and one or two of those interviews were "in court while awaiting for trial" App. 23.[22]

Amadee took no responsibility for filing Francis' pre-trial motions other than offering advice to Tureaud App. 27.[23] He did not recall discussing the grand jury matter with him, but asserted that Tureaud would not have filed one anyway because it would have been "wasted effort" App. 26.

The picture of ineffectiveness is rounded out by the filing of a motion to suppress the confession on the morning of trial App. 30; its denial without a hearing; the probable failure to reserve a bill for exceptions to

[22] Tureaud did meet alone with Francis in the Parish prison but the record does not reflect the time, length or number of those meetings. App. 56.

[23] Even if Amadee were viewed as having some formal responsibility to Francis, he would have had to be associated with Tureaud by March 4, 1965 in order to make a timely challenge. See note 6, supra. While Amadee was vague as to dates, it appears that Tureaud was solely responsible for the challenge on March 4, the date it had to be made. See App. 26, 38.

the denial App. 62-63; and the failure to appeal in spite of Francis' stated desire to appeal App. 36.

Ineffective counsel is the touchstone of the "cause shown" inquiry. *Davis* took pains to point out the competency of Davis' lawyer, 411 U.S. at 234, n. 1. In a post *Davis* decision, the Fifth Circuit did likewise. *Morris v. Sullivan*, 497 F.2d 544, 545 (5th Cir. 1974). *Tollett v. Henderson*, 411 U.S. 258, 268 (1973) required a prisoner to show that the advice of his counsel was not within the "range of competence demanded of attorneys in criminal cases" in order to set aside a guilty plea and mount a grand jury attack. Francis has surpassed the Davis and the *Tollett* standards. The ineptness of his counsel is sufficient cause to relieve him from a pre-trial failure to challenge the grand jury.[24]

If one must show more than ineffective assistance in order to be relieved from the effects of a procedural waiver rule, the longstanding constitutional protections

[24]Compare the "hypothetical case" presented by Mr. Justice Harlan in his dissent in *Fay v. Noia*, 372 U.S. at 448, 463-464. He saw incompetentness of counsel as a factor which, if shown, would permit reversal on direct review of a conviction obtained after indictment by an exclusionary grand jury although a timely challenge had not been made. Justice Harlan's footnote, 372 U.S. at 464 n. 20, to *Michel v. Louisiana* emphasizes that factor. In rejecting Edgar Labat's assertion that ineffective counsel was the reason no timely motion to quash was filed, the Court in *Michel* noted that his counsel "was a well known criminal attorney" who had been honored by the New Orleans Bar as an 'astute and honored criminal lawyer.' *Michel*, 350 U.S. at 101 n. 7. The fact that he failed to file a timely motion to quash did "not overcome the presumption of effectiveness." 350 U.S. at 101. Francis has overcome the presumption.

against grand jury discrimination will have been seriously eroded. The Fifth Circuit did that when it subjected Francis to an "actual prejudice" test. We believe we have shown that such a test goes too far, but even if it was appropriate, Francis passed it and was entitled to relief.

III.

IF THE TEST IS ONE OF ACTUAL PREJUDICE, ABRAHAM FRANCIS HAS MADE A PRIMA FACIE CASE WHICH MEETS THAT STANDARD. THE BURDEN MUST NOW BE PLACED UPON THE STATE TO OVERCOME HIS SHOWING OF ACTUAL PREJUDICE.

The Fifth Circuit remanded Francis' case "to permit a determination of whether the facts presented by Francis constitute a showing of prejudice which would excuse his non-compliance with the state's rule of criminal procedure." 496 F.2d at 899; App. 100. We contend that the petitioner has, upon the facts already developed, made a prima facie showing of prejudice. Therefore, if there is to be such a remand, the burden should now be upon the state to show that Francis was not the subject of prejudice.

In *Davis*, the lack of prejudice stemmed from these facts:

> The same grand jury that indicted petitioner also indicted two white accomplices. The case has no racial overtones. The government's case against petitioner was, although largely circumstancial, a strong one. There was certainly sufficient evidence

against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. . . .

411 U.S. at 243-244.

A point by point examination of the facts in this case reflect that Francis has made a prima facie showing of prejudice.

A. The Racial Aspect and the Uniqueness of the Charge.

The felony murder charge grew out of a grocery store robbery. The victims of the robbery were white and one, a woman, had been shot in the face; the perpetrators were black; one of the perpetrators was killed in the course of the robbery App. 71.

The prosecutor recalled the case because he responded to the police call along with the homicide detectives. He said:

> The thing that made this case different from the normal case was that the deceased on the sidewalk was one of the alleged perpetrators. After the handling of this matter it was decided by the District Attorney's office to prosecute the co-defendants or co-perpetrators of the robbery under the felony murder doctrine for the death of one of their perpetrators. This is the only time I recall this being done not only of my years out here but of my knowledge in Orleans Parish.

App. 71.

Would white perpetrators have been proceeded against under the felony murder doctrine? Why had no one been so charged in the recollected history of the Parish? Did the interracial nature of the crime, a black

man dead and a white woman shot, come into play in the charging decision? Did the grand jury discharge its historical function[25] or was it merely the alter ego of the district attorney's office which "decided" to prosecute . . . under the felony murder doctrine? App. 71. Would a fairly constituted grand jury have subjected a seventeen year old black boy to the possibility of losing his own life upon the district attorney's decision to invoke a rarely used crime?[26]

No one can say for sure what the answer to each of the posited questions is. But the undisputed facts which show racial overtones, a unique decision to charge, a decision made by the prosecutor and then affirmed by a grand jury already determined to be unconstitutionally selected, constitutes a prima facie showing of actual prejudice.

That showing is buttressed by the utter failure of the state trial court to protect Francis' rights. Here, unlike

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[25] *Gerstein v. Pugh*, ____ U.S. ____, 95 S.Ct. 854, 43 L.Ed.2d 54, 67 n. 19 (1975).

[26] No doubt, based upon his confession, a grand jury could have indicted Francis for something. But unlike *Davis* and most other cases, the charge against Francis required a more sophisticated understanding of the law and it cannot be said as unequivocally as it was in *Davis*, 411 U.S. at 244, that he should have been made to stand trial "for the offense with which he was charged."

The district attorney's role is reminiscent of the allegation made at oral argument in *Michel* that the prosecutor in New Orleans was more tolerant of white defendants who sought to make out of time jury challenges. Since that issue was not raised previously, the Court refused to consider it, but commented that if it had been, and "found support in the record, we might have a very different case here." 350 U.S. at 101-102. The record in this case does support a presumption of discrimination in the charging process. The issue was raised when the prosecutor initially testified about the unusual decision to charge.

Davis, there is no assurance that the state's case was a strong one or that Francis had a fair trial. If prejudice is the test, it must encompass all of the elements of injury which flowed from the indictment process.[27]

B. The Totality of the Circumstances Compels a Finding of Actual Prejudice.

In *Powell v. Alabama,* 287 U.S. 45, 71 (1932) defendants on trial for their lives were guaranteed the appointment of "effective" counsel. The trial court appointed a lawyer for Francis who "hadn't handled a murder case in about fifteen years" and who had not even handled "any criminal matters for years." App. 23, 31. The trial judge must have noticed that the first motions were not filed until the day before trial. Nor could he have failed to see that they were forms with a previous defendant's name struck out, or borrowed from the district attorney. See original trial record. Yet no concern was voiced for Francis' right to effective counsel.

The trial court denied the motion to suppress without a hearing, contrary to *Jackson v. Denno,* 378 U.S. 368, 376-377 (1964) which made it "clear" that a defendant has a constitutional right to have a "fair hearing and a reliable determination on the issue of voluntariness. . . ." It appears that no exception was

[27]The Fifth Circuit opinion viewed prejudice as an extremely narrow concept. The illustration it provided turned on a grand jury indicting a black defendant but not his two white accomplices. 496 F.2d at 899; App. 99-100. The use of that example as a measurement of prejudice would be the death knell for 2254 grand jury challenges by state petitioners. A result not envisioned by any authority.

taken to preserve an appeal on the confession issue. But even if one was, in the absence of an evidentiary record such an appeal would be meaningless.

The trial court's protection of Francis' appellate rights was limited, at best:

> Q. Does this defendant state at this time he does not intend to take an appeal?
>
> A. I am not.

App. 21.

In sum, beginning with an indictment which grew out of a unique decision to charge and has been found to have been returned by a grand jury from which Negroes were excluded, the petitioner has been tried, convicted and committed to prison for life by a process which falls short of due process.[28] Francis had one day in court – June 24, 1965. There is no way to be assured that his day in court was a fair one. The evidence he has presented compels the conclusion that he has carried his burden of showing actual prejudice.

If "actual prejudice" is the test, then on remand the State of Louisiana should have the burden of showing that Francis did not suffer such prejudice.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit should be reversed, and

[28]Serious questions also exist as to the validity of the petit jury which tried Francis. The jurors for both grand and petit juries were chosen from the same wheel, *Labat v. Bennett,* 365 F.2d at 713-715. Given the district court's conclusion that the *Labat* practices existed during Francis' exposure to the Orleans Parish grand jury, it is most likely that his petit jury was exclusionary.

the opinion and judgment of the District Court for the Eastern District of Louisiana reinstated.

If the Court of Appeals decision is affirmed, then the petitioner submits that on the remand to the District Court for the Eastern District of Louisiana, the burden of proof should be upon the respondent to show that no actual prejudice occurred as a result of the grand jury indictment returned against Abraham Francis.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5808

ABRAHAM FRANCIS,

Petitioner,

versus

C. MURRAY HENDERSON, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF STATE OF LOUISIANA, RESPONDENT

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BRIEF OF STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

In 1964 Abraham Francis, petitioner herein, was indicted for murder by the Orleans Parish Grand Jury in New Orleans, Louisiana. R. 7, 11. In 1965 Francis was tried in the Criminal District Court for the Parish of Orleans, found guilty, and sentenced to life imprisonment. R. 7, 11. At no time, either prior to or during his trial, did Francis challenge the method of jury selection in Orleans Parish, R. 6, thus waiving the issue under the then existing Louisiana procedural statute, La. R.S. 15:202, as interpreted by the Louisiana Supreme Court in *State v. Wilson*, 204 La. 24, 14 So.2d 873 (1943), and *State v. Chianelli*, 226 La. 552, 76 So.2d 727 (1954).

to the effect that in Louisiana an attack on the grand jury must be made before the end of the third day after expiration of the grand jury's term, or before trial, whichever is earlier; that an objection to a petit jury must be filed some time prior to trial; and that if the jury issue is not timely raised it is waived. See *Michel v. Louisiana*, 350 U.S. 91 (1955).

Francis did not appeal his conviction to the Louisiana Supreme Court. R. 21, 37-38. However, six years after his conviction, in 1971, he filed a Petition For Writ of Habeas Corpus in the Criminal District Court for the Parish of Orleans, alleging that the grand jury in his case had been chosen in a manner which discriminated against the black race, of which he is a member. R. 22-75. The Louisiana trial court held that Francis had waived his right to raise such questions by not urging them timely. R. 77-78. The Louisiana Supreme Court also denied Francis' Petition for Writ of Habeas Corpus. R. 79.

Thereafter, in March of 1972, Francis filed his Petition For Writ of Habeas Corpus in the United States District Court for the Eastern District of Louisiana. R. 1. The matter was referred to the United States Magistrate, who held an evidentiary hearing.[1] In September of 1973 the United States District Court, acting upon the Magistrate's recommendation, set aside Francis' conviction and sentence on the ground that the Grand Jury which indicted him was invalidly selected in that it discriminated against members of the black race. R. 87-92. Relying on *Davis v. United States*, 411 U.S. 233 (1973), the State of Louisiana

1 See *Wingo v. Wedding*, 418 U.S. 461 (1974), disapproving such a procedure.

appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit reaffirmed its earlier holding in *Jones v. Henderson*, 494 F.2d 47 (1974), and, relying on *Davis v. United States*, supra, held that Francis had waived his right to attack the composition of his grand jury by not acting timely, but remanded the matter to the United States District Court to enable Francis to attempt to avoid the waiver principle by showing actual prejudice. *Newman v. Henderson*, 496 F.2d 896 (5th Cir. 1974); R. 94-100.

On April 28, 1975, this Honorable Court, on application of Abraham Francis, granted a writ of certiorari in order to review the matter. R. 101.

ARGUMENT

I.

The Waiver Principle Of *Davis* Should Apply Equally To The Several States

In *Davis v. United States*, 411 U.S. 233 (1973), the accused, a black man, went to trial without objecting to the composition of the grand jury which indicted him, an issue which under Rule 12(b)(2) of the Federal Rules of Criminal Procedure must be raised by motion prior to trial. Approximately three years after his conviction Davis filed a motion to dismiss the indictment pursuant to 28 U.S.C. 2255, alleging that qualified Negro jurymen had been systematically excluded from the grand jury which indicted him, and that his collateral attack on his conviction could be precluded only after a hearing in which it was established that he

deliberately bypassed or understandingly and knowingly waived his claim to unconstitutional grand jury composition, relying, *inter alia*, on *Fay v. Noia*, 372 U.S. 391 (1963), and *Kaufman v. United States*, 394 U.S. 217 (1969). In holding that Davis had waived his right to challenge the composition of his grand jury, this Court said: (at 411 U.S. 241-242)

> "The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.
>
> "* * *
>
> "We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the

> Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review."

The State of Louisiana respectfully submits that the reasoning of *Davis* applies equally well to state criminal proceedings, and that the waiver provision of former La. R.S. 15:202 governs an untimely claim of grand jury discrimination not only during the Louisiana criminal proceeding, but also later on collateral review, whether state or federal.

At the time of Francis' trial in 1965, La. R.S. 15:202 (as interpreted in *State v. Wilson*, supra) provided that in Louisiana criminal proceedings an attack on the grand jury must be made before the end of the third day after the expiration of the grand jury's term, or before trial, whichever was earlier: "otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." See *Michel v. Louisiana*, 350 U.S. 91 (1955). In *Michel* the following relevant language is found: (at 350 U.S. 97)

> "It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury."

Also in *Michel* in footnote 5, 350 U.S. 98, appears the following, which is especially relevant in the present case:

> "Not only may the prompt determination of such preliminary matters avoid the necessity of a second trial, but a long delay in its determination, such as here, makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness. Furthermore, a successful attack on a grand jury that sat several years earlier may affect other convictions based on indictments returned by the same grand jury."

Also pertinent in the instant case is *Tollett v. Henderson*, 411 U.S. 258 (1973), decided the same day as *Davis v. United States*. In *Tollett* this Court held that a voluntary and intelligent plea of guilty forecloses a later attack on the racial composition of the grand jury

which returned the indictment, even though at the time of the plea facts relating to the selection of the grand jury in question were unknown to both the accused and his attorney.[2]

In the instant proceeding Francis was represented by two able black attorneys, A. P. Tureaud and Earl J. Amedee, who because of their race would have felt no hesitation about urging the jury discrimination issue had they felt it was warranted.[3] Further, although A. P. Tureaud may have been lacking in recent criminal practice experience, Francis' other lawyer, Earl J. Amedee, more than made up for this by being a very capable criminal attorney who had been handling criminal cases since he graduated from law school in 1950, who had served as Assistant District Attorney for Orleans Parish from 1958 through 1960, and who at the time of Francis' indictment and trial in 1964-1965 had already appeared for either the State or the defense in countless murder cases. R. 23-26, 43. Thus it was not for lack of experience or carelessness that Messrs. Tureaud and Amedee failed to urge the jury discrimination issue, but rather because they believed it would be a waste of time for the reason that there were blacks on the grand jury and on the petit jury panel, R. 26, and also because an attack on the jury selection process would be "wasted effort", R. 26, in view of the fact that this question had already been litigated in depth in a series of Orleans Parish capital

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2 Of course, in *Tollett*, in fn. 1 at 411 U.S. 260, the issue posed by the present proceeding was expressly left open.

3 For sound reasons black attorneys were often appointed to represent black accuseds in capital cases in Orleans Parish at this time. Pertinently, the three attorneys who represented Bruce Barksdale in the historic jury case at this period were all black.

cases in which eventually both the Louisiana Supreme Court and this Court found no racial discrimination in the selection of juries in Orleans Parish since 1958, when this Court's decision in *Eubanks v. Louisiana*, 356 U.S. 584 (1958), caused the jury selection method in Orleans Parish to be radically changed so as to include blacks on all jury panels. See, *e.g.*, *State v. Barksdale*, 247 La. 198, 170 So.2d 374 (1964), cert. denied *Barksdale v. Louisiana*, 382 U.S. 921 (1965);[4] *State v. Simpson*, 247 La. 883, 175 So.2d 255 (1965), cert. denied *Simpson v. Louisiana*, 384 U.S. 1014 (1966); *State v. Johnson*, 249 La. 950, 192 So.2d 135 (1966), cert. denied *Johnson v. Louisiana*, 388 U.S. 923 (1967); *State v. Brown*, 249 La. 235, 186 So.2d 577 (1966).

There can be no doubt that in 1964 and 1965 Messrs. Tureaud and Amedee evaluated the jury situation in Orleans Parish correctly. As revealed by the massive records dealing with this issue in *State v. Barksdale*, *State v. Simpson*, *State v. Johnson*, etc., supra, there existed in Orleans Parish at this time no intentional, systematic discrimination against the black race in the selection of juries, either grand or petit. A study of these records amply supports the holding of the Louisiana Supreme Court in 1964 that since 1958 there had been no discrimination against blacks in the selection of juries in Orleans Parish, and that economic, psychological, and educational factors adequately explained the fact that although of the total male population in Orleans Parish in these years between the ages of 20 and 64 a little more than 33 per cent were black, only approximately 16 to 20 per cent

4 The *Barksdale* case has recently been back in this Court under docket numbers 74-6322 and 73-1536.

of the males on jury panels in Orleans Parish at this time were black. See *State v. Barksdale*, 247 La. 198, 179 So.2d 374 (1964); cert. denied, *Barksdale v. Louisiana*, 382 U.S. 921 (1965).

In fact, there can be no doubt that had Francis' attorneys thought it worthwhile to attack the existing jury selection method in Orleans Parish prior to Francis' trial they would simply have adopted the issue as raised and litigated in *State v. Barksdale*, supra, the key case, in which the method of jury selection in Orleans Parish — from the appointment of the jury commissioners by the Governor of Louisiana, through the general venire, the grand jury venire, the grand jury selection, the petit jury venire, and the petit jury selection — was explored in depth, and a massive record dealing with the question was made; all of the other capital cases involving blacks which urged the jury discrimination point between 1963-1966 in Orleans Parish tied into the *Barksdale* record by reference. See *State v. Simpson*, *State v. Johnson*, *State v. Brown*, supra.

The main thrust of Francis' argument in brief filed in this Court appears to be that the jury selection process in the several states can only be kept free from racial bias by permitting the jury discrimination issue to be urged for the first time by the accused in a collateral proceeding years after his trial and conviction, unless the State can show under the *Fay v. Noia*[5] test that he deliberately, intentionally, and knowingly by-passed the state procedure for raising the jury dis-

5 372 U.S. 391 (1963).

crimination question prior to trial, a showing which it is well nigh impossible for the prosecution to make.

This contention not only disregards the basics of life in the United States in 1975, when blacks through the ballot box and the voting machine participate fully in the judicial process and are perfectly able to protect themselves from any threatened discrimination in the selection of criminal juries and elsewhere, but petitioner's argument also overlooks the fact that Louisiana, like other jurisdictions, provides a fair and workable procedure for attacking the racial composition of grand and petit juries in criminal cases by the filing of a motion to quash prior to trial. See Arts. 532(9), 533, 535 La. Code Crim. Proc.

Thus, the issue posed by the instant case is not *whether* attacks on the composition of state juries in criminal matters should be permitted, but rather *when* they should be permitted. In this context the State of Louisiana believes that all of the reasons set forth by this Court in its opinion in *Davis* in favor of the doctrine of waiver by failure to timely object to the make-up of the jury prior to trial in federal criminal proceedings apply with equal force to criminal proceedings in state courts. Additionally, it appears that from a sociological point of view a current attack on jury selection processes is much more effective, and hence desirable, than an attack mounted approximately a decade later, as in the instant case. In today's fast moving world events which occurred ten years ago are ancient history.

The principle of comity is also an important factor in the present proceeding. As Mr. Justice Powell said

in his concurring opinion in *Schneckloth v. Bustamente*, at 412 U.S. at 263-265 (footnotes omitted)

> ". . . the present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems. The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries. Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court and then President of the National Center for State Courts, in identifying problems between the two systems, noted bluntly that '[t]he first, without question, is the effect of Federal habeas corpus proceedings on State courts.' He spoke of the 'humiliation of review from the full bench of the highest State appellate court to a single United States District Court judge.' Such broad federal habeas powers encourage in his view the 'growing denigration of the State courts and their functions in the public mind.' In so speaking Justice Reardon echoed the words of Professor Bator:
>
> 'I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an in-

> discriminate acceptance of the notion that all the shots will always be called by someone else.'
>
> "In my view, this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate. This can be accomplished without retreat from our inherited insistence that the writ of habeas corpus retain its full vitality as a means of redressing injustice."

The principle of comity requires that the waiver rule of *Davis* be available to the several states. Louisiana respectfully submits that the waiver standard expressed in former La. R.S. 15:202 should govern an untimely claim of jury discrimination not only during the Louisiana criminal proceeding, but also later on federal collateral review.

II.

The "Actual Prejudice" Principle of *Davis* Should Also Apply To The Several States

In *Davis* this Court quoted with approval the following excerpt from its opinion in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), on which the lower court had relied in denying relief, regarding the question of prejudice:

> ". . . where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant of relief from the effect of that Rule." 371 U.S. at 363.

Thereafter, this Court's opinion in *Davis* continues thus: (411 U.S. at 244-245)

> "Petitioner seeks to avoid this aspect of *Shotwell* by asserting that there both lower courts had found that petitioners were not prejudiced in any way by the alleged illegalities whereas under *Peters v. Kiff*, 407 U.S. 493 (1972), prejudice is presumed in cases where there is an allegation of racial discrimination in grand jury composition. But *Peters* dealt with whether or not a white man had a substantive constitutional right to set aside his conviction upon proof that Negroes had been systematically excluded from the state grand and petit juries which indicted and tried him. Three Justices dissented from the Court's holding of such a substantive right on the ground that no prejudice had been shown, and three concurred separately in the judgment. But the three opinions delivered in *Peters*, *supra*, all indicate a focus on the existence of the constitutional right, rather than its possible loss through delay in asserting it. The presumption of prejudice which supports the existence of the right is not inconsistent with a

holding that *actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.*" (Emphasis ours)

In the interest of comity, finality, and reasonably current dockets, the State of Louisiana respectfully submits that for the several states as well as for the federal government the "waiver-by-failure-to-object" and "actual-prejudice" principles of *Davis v. United States* should prevail over the "deliberate by-pass" test of *Fay v. Noia*, 372 U.S. 391 (1963). Otherwise, the administration of criminal justice in the several states will continue to be unduly hobbled by the relitigation of ancient issues which should have been forever waived by not being timely raised prior to the original trial.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit in the instant case.

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CERTIFICATE

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